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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 300

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, ET AL., PETITIONERS,

vs.

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 10, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, et al., Relators,

vs.

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, GUY A. THOMPSON, Trustee, et al., Respondents

PRÆCIPE FOR TRANSCRIPT—Filed March 20, 1937

It is agreed by and between the parties hereto through their respective attorneys of record that the transcript of [fol. 2] record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit in connection with the appeal heretofore allowed by the District Court in the above cause, shall be printed by the clerk of the Circuit Court of Appeals and shall include the following:

1. Caption.
2. This stipulation.
3. Petition of Relators for Peremptory Writ of Mandamus.
4. Citations or notices.
5. Order of the United States District Court of St. Louis authorizing suit in the Southern District Court of Texas against Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company.
6. Motion to dismiss for lack of jurisdiction filed by Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company.
7. Motion to dismiss for lack of jurisdiction filed by Port Isabel & Rio Grande Valley Railway.
8. Memorandum opinion of the Court filed the 16th day of March, 1937.
9. Final decree of the Court.
10. Petition for allowance of appeal.
11. Order allowing appeal.
12. Assignments of error.

[fol. 3] 13. Bond on appeal.
14. Waiver of citation and notice of respondents.
15. Statement of evidence.
16. Order approving statement of evidence.
17. Certificate of the clerk.

Respectfully submitted, Brownsville Navigation District of Cameron County, Texas, F. A. Lallier, J. G. Philen, Jr., Relators, by A. B. Cole, A. L. Reed, Their Attorneys. The St. Louis, Brownsville and Mexico Railway Company, Guy A. Thompson, Trustee, by R. H. Kelley, Its Attorney. Port Isabel & Rio Grande Valley Railway Company, by J. H. Tallichet, Its Attorney.

The foregoing is not agreed to but is accepted as service of a copy of a præcipe.

R. H. Kelley, Atty. for Thompson Trustee.

[fol. 4] IN UNITED STATES DISTRICT COURT

APPLICATION FOR WRIT OF MANDAMUS—Filed December 11, 1936

Petition of Brownsville Navigation District of Cameron County, Texas, and Others, for a Peremptory Writ of Mandamus Under Section 49, Title 49, Chapter 2, U. S. C. A., and Section 41 (8), Title 28, Chapter 2 of the Judicial Code, U. S. C. A.

To the Honorable Thomas M. Kennerly, Judge of the District Court of the United States for the Division and District Aforesaid:

Petition of Brownsville Navigation District of Cameron County, Texas; F. A. Lallier, operating under the trade name of Lallier and Company; J. G. Philen, Jr., operating under the name of J. G. Philen, Jr. Company, and under the name of Philen, Miller and Company, all of Brownsville, against the St. Louis, Brownsville and Mexico Railway Company, Debtor, Guy A. Thompson, Trustee, of Houston, Texas, and Port Isabel and Rio Grande Valley Railway Company of Brownsville, Texas, respondents, would respectfully show as follows:

I

That the Brownsville Navigation District of Cameron County, Texas, is a navigation district duly incorporated under the laws of the State of Texas, more particularly described in Chapter 192, House Bill 724 of the 41st Legislature, Regular Session and Chapter 3, Senate Bill 29 of the 42nd Legislature, Regular Session. The boundaries of said navigation district are particularly described in House [fol. 5] Bill 724, Chapter 192 of the 41st Legislature, Regular Session. A general description thereof, however, is that the navigation district is wholly within the boundaries of Cameron County, Texas, and is composed largely of the citizens and residents of the City of Brownsville, Cameron County, Texas. This petitioner will hereafter sometimes be referred to as the Port of Brownsville.

Petitioner F. A. Lallier (hereinafter sometimes referred to as Lallier) is engaged in the stevedore business, freight brokerage business and forwarding agent business. In his capacity as forwarding agent, he acts as the direct representative of the shippers and handles the commodities for the account of the owners as their shipping agent. Commodities are consigned to him as consignee and are shipped by him as consignor.

Petitioner J. G. Philen, Jr., is the sole owner and operator of the company of J. G. Philen, Jr. Company and Philen, Miller and Company. The business operated by petitioner J. G. Philen, Jr. (hereinafter sometimes referred to as Philen) is in all things identical with that of petitioner Lallier, with respect to the forwarding business.

All of petitioners reside in the City of Brownsville, County of Cameron, Texas.

Respondent, the St. Louis, Brownsville and Mexico Railway Company, Debtor, Guy A. Thompson, Trustee, is a corporation duly incorporated and organized under the laws of the State of Texas with its principal office, principal place of business and residence in Houston, Harris County, Texas. This respondent is now being operated by Guy A. Thompson, Trustee, as a result of his having been duly appointed Trustee in the reorganization pro- [fol. 6] ceedings pending in the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, being cause No. 6935, "Proceeding for the Reorganization of a Railroad." Duly appointed officers and agents

of this respondent reside in Brownsville, Cameron County, Texas, and in Houston, Harris County, Texas, upon whom service may be had.

Respondent Port Isabel & Rio Grande Valley Railway Company is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Texas with its headquarters, principal place of business and residence in Brownsville, Cameron County, Texas. There are duly appointed officers and agents of this respondent residing in Brownsville, Texas, upon whom service may be had.

II

Petitioner, the Port of Brownsville, through the organization of the navigation district, caused to be dredged and constructed a ship channel 17 miles in length from Brazos Santiago Pass on the Gulf of Mexico inland to a point approximately 5 miles from the geographical center of Brownsville, Texas. Said channel is a modern ship-channel of sufficient depth and width to accommodate all seagoing vessels of the type customarily calling at gulf ports for the transportation of commodities to and from the ports located on the Gulf of Mexico from New Orleans to Brownsville, Texas. The dredging and construction of the ship-channel from Brazos Santiago Pass to the turning basin at or near Brownsville was accomplished by the investment of $5,788,630; of this amount $2,853,000 was paid by the taxpayers and citizens of the Brownsville Navigation District residing principally in the City of Brownsville and $2,935,630 was paid by the United States Government. The [fol. 7] greater part of the amount borne by the government was expended in connection with the outer channel and the building of the jetties. In addition to the $2,853,000 less $722,000 Government grant invested by the taxpayers and citizens of the navigation district, such citizens and taxpayers have invested approximately $740,000 in the development of terminal facilities for the handling of traffic to and from the port. These facilities consist principally of wharves, warehouses and other such facilities customarily used in the accommodation of export and import traffic moving through the ports of entry along the Gulf of Mexico. The Port of Brownsville invested $2,853,000 in the channel and an additional $740,000 in facilities upon the faith and confidence that the tonnage tributary to the

port would move via these facilities through the port and as a result of the navigation district would earn certain charges per ton which are assessed for the privilege of using the facilities erected at the turning basin. Such charges and revenues were to be used to operate the port, pay interest on their bonds and ultimately to retire the bonds. The Port of Brownsville assesses a port charge of various amounts on various commodities for the privilege of using the facilities afforded the commerce. The revenues accruing to the Port of Brownsville are those customarily accruing from the dockage of ships, wharfage and other similar income from the use of port facilities. These amounts vary with the commodity, size of vessel, etc. They are substantial, as evidenced by the fact that since the port opened there has been exported 23,563 bales of cotton from which the Port of Brownsville received $3,-646.99. Revenues from the sources described which would accrue on the traffic that had been secured for movement through the Port of Brownsville would amount to $78,000 should the traffic move through Brownsville as scheduled. [fol. 8] Some of the traffic did so move but the remainder was diverted and is now being diverted from the Port of Brownsville to other ports because of the difficulty hereafter to be more particularly described. The sole source or revenue from which the Port of Brownsville may carry on the expense of operating and maintaining the port is the traffic moving to and through the port.

Petitioner Lallier is engaged in the stevedore business, is an ocean freight broker and is also engaged in the forwarding business for the shippers of commodities to, from and through the Port of Brownsville. For the services which he renders on the traffic handled through that port, he receives charges varying in amounts based on the weight and size of the articles. He established his business in the Port of Brownsville solely because of the opening of the port and solely because of the prospects for substantial tonnage to be handled for shippers through that port to and from old Mexico and to and from the Rio Grande Valley territory. Some of the tonnage has already moved but the major portion of it is now and will be diverted to other ports because of the difficulty hereinafter to be more particularly described resulting in an annual loss to petitioner Lallier of approximately $25,000. That petitioner Philen

is engaged in identically the same business as petitioner Lallier and such petitioner has developed through contracts and arrangements with shippers in old Mexico and in the Rio Grande Valley future movements of traffic through the Port of Brownsville to be rehandled and reshipped by petitioner's facilities. Petitioner's revenue from this traffic is his principal means of existence and he has invested in and spent for the purpose of securing and developing this traffic the sum of $15,000. Some of the traffic has already moved but the great majority of it has been, is and will be diverted from Brownsville to other ports because of the [fol. 9] acts of respondents hereinafter to be more particularly described. If such traffic is diverted and is lost to the Port of Brownsville, petitioner Philen will sustain an annual loss of revenue and profits from this traffic of approximately $25,000.

Respondent, the St. Louis, Brownsville and Mexico Railway, Debtor, Guy A. Thompson, Trustee (hereinafter referred to as Missouri Pacific), operates a railroad from Houston, Texas, in Harris County, through various counties in the State of Texas into the Rio Grande Valley and particularly into Brownsville in Cameron County, Texas. Said respondent, Missouri Pacific, operates within Brownsville a depot and terminal facilities for the handling of the local traffic, for switching and other terminal services. In addition, said respondent Missouri Pacific owns and controls, or jointly with other parties unknown to these petitioners, owns and controls an international bridge for the handling of traffic between Brownsville, Cameron County, Texas, and Matamoras in the State of Tamaulipas, Mexico. Said City of Brownsville, in Cameron County, Texas, and Matamoras in the State of Tamaulipas, Mexico, are situated adjoining each other except that they are separated by the international boundary line located in the center of the Rio Grande River. In the center of said international bridge, respondent Missouri Pacific lines connects with the rail lines of Mexico serving the community of Matamoras.

Respondent, Port Isabel & Rio Grande Valley Railway operates a line of railway approximately 26 miles long from Brownsville to Port Isabel in Cameron County, Texas. It has a switching connection with the facilities at the turning basin of the Port of Brownsville. This respondent is the only railway that has trackage connection with the facilities

[fol. 10] of the Port of Brownsville. It also connects in the City of Brownsville with the Respondent Missouri Pacific lines.

In order to move the traffic from the turning basin at the Port of Brownsville to uptown Brownsville and to a connection with the railways of Mexico serving Matamoras, it is necessary to use the joint service of both respondents. Respondent Port Isabel & Rio Grande Valley Railway Company owns three freight cars which are wholly inadequate to serve the traffic moving to and from the Port of Brownsville. Heretofore, at all times in the past, it has been customary for the other railroads, including respondent, Missouri Pacific lines, to furnish equipment in the form of flat cars, gondola cars and box cars to respondent Port Isabel & Rio Grande Valley Railway for the purpose of moving traffic originating on and destined to locations on that line of railway, such equipment being furnished by the other carriers including the respondent Missouri Pacific lines, on a rental basis of an agreed charge of $1.00 per day. This rental charge is the universally accepted charge for the use of equipment by one carrier that is owned by another carrier.

Both respondents have published and have on file with the Interstate Commerce Commission lawfully published and effective tariffs providing for the exact charges that shall apply on all traffic moving from the turning basin at the Port of Brownsville to the City of Brownsville and thence via the line of the respondent Missouri Pacific to the international bridge for delivery to the railways of Mexico. Respondent Port Isabel & Rio Grande Valley Railway has a lawful published tariff known as W. A. Ellington's I. C. C. No. 4 on file with the Interstate Commerce Commission which became effective July 1, 1936, establishing a charge of $8.10 per car on all commodities with some exceptions [fol. 11] not relevant here, for the transportation from the turning basin to the interchange tracks with respondent Missouri Pacific lines, this $8.10 per car applying with no limitation as to weight per car, except that established by the capacity of the car itself. Certain commodities are excepted but they are of no importance here. We are concerned here only with the commodities included in the $8.10 per car charge.

Respondent Missouri Pacific Lines have on file with the Interstate Commerce Commission Terminal switching No.

490 I. C. C. No. 30 establishing a charge of $3.15 per car for the transportation from the interchange point with the respondent Port Isabel & Rio Grande Valley Railway to the international bridge, which charge is applicable on all commodities and applies per car with no limitation as to weight except that limitation which is fixed by the capacity of the car itself.

Respondent Missouri Pacific Lines have a joint tariff arrangement with the National Railways of Mexico for the handling of the traffic over the International bridge between the United States and Mexico known as the Brownsville and Matamoras Bridge Company. The published charges for the use of the International bridge on traffic moving from the United States to Mexico are contained in Joint Bridge Charges Tariff No. 1178-N, I. C. C. No. 15, and on traffic moving from Mexico to Brownsville in Tariff No. 2, issued by the Brownsville Matamoras Bridge Company and all these charges are concurred in by the respondent Missouri Pacific Lines. Both tariffs cover classes 1 to 12 with charges ranging from 46½ to 23½ per metric ton or 1,000 kilos and further contain a few certain commodity rates.

[fol. 12] Both respondents have published and made public these tariffs offering to handle traffic for the public generally for the charges therein specified. Both publications are filed with the Interstate Commerce Commission in conformity with Section 6, Title 49, Chapter 1, U. S. C. A. Said act obligates all common carriers subject to the provisions of the Interstate Commerce Act to file with the Commission in printed form and to keep open to public inspection schedules showing all rates, fares and charges for the transportation of property between different points on its own route and between points on its own route and points on the routes of other carriers. Said section of the Interstate Commerce Act particularly obligates the carriers subject to its provisions, in those instances where there is no joint rate over the through route, to establish and file in the manner above described separately established rates, fares and charges applying to the through transportation.

Both respondents are common carriers subject to the provisions of the Interstate Commerce Act.

It is made the duty of all common carriers subject to the provisions of the Interstate Commerce Act by Section 1, Paragraph 4, Title 49, Chapter 1, U. S. C. A., to furnish transportation of all commodities moving in interstate com-

merce upon reasonable demand therefor and to provide facilities for its transportation. Petitioners have made reasonable and seasonable demand upon respondent to transport the commodities herein involved. Respondents have published rates which they have voluntarily offered to the public as reasonable rates for its transportation and have refused to permit traffic moving through the Port of Brownsville to be transported at those rates and have refused to furnish facilities and equipment for its transportation.

[fol. 13] It is made the duty of every common carrier subject to the provisions of the Interstate Commerce Act by Section 1, Paragraph 11, Title 49, Chapter 1, U. S. C. A., to furnish safe and adequate cars for the transportation of all commodities tendered them moving in interstate commerce.

Respondent carriers are both members of the Association of American Railroads Transportation Division and are both parties to an agreement between all railroads known as the Code of Car Service Rules and Code of Per Diem Rules under which the railroads of the nation agree that each may use the cars of the other and particularly is it agreed by Appendix B of those rules and regulations to permit short line railroads who do not own equipment to use that owned by trunk line railways for fixed compensation of $1 per day. It is specifically alleged that said agreement is still in effect as between those respondents, and that respondent Missouri Pacific lines has refused and declined to furnish equipment to respondent Port Isabel Railway for the purpose of moving the traffic that is now available for transportation from the Port of Brownsville to Matamoras in the State of Tamaulipas, Mexico. It is alleged that said agreement between the railroads and particularly between respondents has been entered into for the purpose of facilitating the transportation of commodities between connecting carriers and for the benefit of shippers and receivers of freight such as petitioners as herein described.

III

This is a civil suit of a legal nature arising under the constitution and laws of the United States, particularly under the law regulating interstate commerce, to-wit, Interstate [fol. 14] Commerce Act as amended and paragraph 8, Section 24, Judicial Code, United States and particularly under

Article 49, Title 49, Chapter 1, U. S. C. A. being the Interstate Commerce Act.

IV

For all times in the past at the various gateways and ports, said respondents have handled carload traffic under rates and charges herein described. At the present time said respondents are handling traffic under rates herein described and particularly is respondent, Missouri Pacific lines handling traffic under tariffs and charges similar to that herein described at Laredo, Texas, for the interchange and switching of traffic between Laredo in the State of Texas, and Nuevo Laredo in the State of Tamaulipas, Mexico. Particularly is respondent Missouri Pacific lines furnishing equipment for the transportation of commodities into old Mexico through various gateways, including the Brownsville gateway. Heretofore at all times in the past and at the present time, said respondent Missouri Pacific lines has had arrangements and agreements with the railways of Mexico under which commodities, loaded in its equipment, box cars, flat cars and gondola cars in the United States, are permitted to move across the international boundary line for interchange with the railways of Mexico.

Heretofore at all times in the past and at the present time, respondent Missouri Pacific lines has furnished equipment, box cars, flat cars and gondola cars for the interchange of traffic coming from old Mexico into the United States through the various gateways including Brownsville, Texas.

Particularly has respondent, Missouri Pacific lines furnished such equipment for the transportation to and from [fol. 15] Mexico at various gateways at Laredo and Brownsville for the tariff charges lawfully on file with the Interstate Commerce Commission, hereinbefore more particularly described.

Respondent, Missouri Pacific Lines, has heretofore at all times in the past and is now at the present time, furnishing its equipment for the transportation of all commodities from the ports of Corpus Christi and Houston, Texas, to various gateways including Laredo and Brownsville, Texas, for interchange with the national railways of Mexico for transportation into old Mexico. Such transportation and interchange of traffic between respondent Missouri Pacific lines and the railways of Mexico takes place under tariffs on file with the Interstate Commerce Commission covering the

transportation to the boundary line between the United States and Mexico.

V

Beginning with the opening of the Brownsville port about May 16, 1936, certain commodities began moving from old Mexico through the Mexican gateway of Matamoras and the United States gateway of Brownsville for loading on board vessels at Brownsville and certain commodities began moving from various foreign origins and American origins via water to Brownsville for transportation via American railways to Matamoras for reshipment into the interior of old Mexico. The commodities which have moved are cotton, cotton linters, cottonseed cake, coke, iron and steel articles, pipe and farm implements, and various less than carload lots of merchandise traffic. For the transportation of these commodities, 69 ocean-going vessels have called at the Port of Brownsville and have received or discharged 35,039 tons of freight, 15,228 tons of which either originated in or was destined to Mexico. There is available, a minimum annual [fol. 16] tonnage for transportation to and from Mexico commodities described as follows:

50,000 bales of cotton, 10,000 tons of cottonseed cake, 100,000 tons of lead bullion, 6,000 tons per month of coke, 6,000 tons of steel billets, 1,000 tons of scrap iron, 4,000 bales of cotton linters, 1,000 tons of cement monthly, 2,000 tons of zinc concentrate monthly and substantial quantities of general merchandise traffic, the exact tonnage of which it is impossible to state.

It is specifically alleged that definite and known arrangements were made by petitioners for the movement of this traffic through the Port of Brownsville; that definite commitments had been made to petitioners arranging for the interchange of this traffic between railroads and steamship lines at the Port of Brownsville on a basis that would have accommodated the tonnage above described and which would have materially aided the development of future movements of these same commodities through the Port of Brownsville.

It is specifically alleged that the navigation district of the Port of Brownsville would have received approximately $78,000 in direct revenue from the tonnage then in prospect for transshipment at Brownsville. It is specifically alleged that petitioner Lallier would have received approximately

$15,000 from this traffic and will receive $15,000 from this traffic if it is moved through the Port of Brownsville. It is specifically alleged that petitioner Philen will receive $10,000 from traffic hereinabove described if it moves through the Port of Brownsville. It is further specifically alleged that if this traffic is diverted to other gateways and other ports that the Port of Brownsville will lose $78,000 in revenue needed to maintain the port and meet its fixed charges. [fol. 17] It is specifically alleged that if this traffic is diverted to other ports and other gateways that petitioners Lallier and Philen will lose approximately $25,000 from the traffic already definitely committed for movement through the Port of Brownsville.

VI

It is alleged that subsequent to May 16, 1936, and after the opening of the Port of Brownsville, respondent Missouri Pacific lines refused and declined and is now refusing and declining to furnish the necessary equipment for the movement of the traffic through Brownsville and did, in fact, refuse to furnish equipment for some of the traffic that was already in the Port of Brownsville for transshipment to Matamoras and did refuse to furnish the equipment for the transportation of some traffic that was already in Matamoras for movement to the Port of Brownsville for reloading on vessels either then awaiting the traffic in the Port of Brownsville or that would shortly thereafter call for the traffic. Such action on behalf of respondent Missouri Pacific lines made it necessary for the Port of Brownsville, at its expense, to provide for the transportation of the commodities between the turning basin and Matamoras via motor vehicles. It is specifically alleged that the expense of rehandling the traffic in motor vehicles will prohibit its movement through Brownsville and it is further alleged that the owners of the commodities because of the damage from rehandling refuse to permit them to be rehandled in motor vehicles. The amount of such additional expense and tonnage is impossible of exact determination but is estimated at more than $5,000 per month.

Because of the impossibility of definitely fixing the damages and because of the attitude of the owners of [fol. 18] the commodities and the certainty that petitioners will lose future traffic and the good will of owners of commodities, petitioners have no adequate remedy at law and

therefore respectfully seek a peremptory writ of mandamus from this Honorable Court. It is specifically alleged that at the present time respondent Missouri Pacific lines is declining and refusing to furnish equipment for the purpose of transporting commodities hereinabove described at the rates which it has lawfully published for application for transportation of said commodities.

VII

It is alleged that on and subsequent to the opening of the Port of Brownsville, respondent Missouri Pacific lines refused to permit respondent, Port Isabel & Rio Grande Valley Railway to load equipment that was already on its line and at the turning basin of the Port of Brownsville. It is specifically alleged that under date of October 15, 1935, H. R. Safford, Executive Vice-President of respondent Missouri Pacific Lines at Houston, Texas, wired L. S. Bourne, General Manager of respondent Port Isabel & Rio Grande Valley Railway of Brownsville, Texas, as follows:

"Reference Mr. Booth's letter October 7th furnishing equipment for handling freight through Ports of Brownsville and Port Isabel destined points in Mexico you have offered us today MP 83054 sheet steel from Brownsville Port for Monterrey. This car was delivered you in line haul service for unloading at Port Isabel and was loaded at Brownsville without authority from us. Effective today discontinue loading any of our Missouri Pacific System line cars to points in Mexico unloaded on your line received on either road haul or switch service and return them to us empty under the usual car service rules. Would appreciate your acknowledgment and understanding."

[fol. 19] It is further alleged that respondent Port Isabel & Rio Grande Valley Railway is abiding by said instructions of respondent Missouri Pacific lines and is refusing to permit shippers and consignees desiring to use the Port of Brownsville to load cars that are made empty at the docks of the turning basin. L. S. Bourne, General Manager of respondent Port Isabel & Rio Grande Valley Railway, in line with instructions of respondent Missouri Pacific Lines, under date of November 3, 1936, addressed the following letter to petitioner Philen:

"A few days ago I advised your Mr. Philen verbally that the Missouri Pacific and Southern Pacific lines officials had

placed instructions prohibiting the Port Isabel and Rio Grande Valley Railway from loading any freight car equipment delivered it by them with freight destined to points in Mexico.

"This applies to all equipment regardless of ownership and we necessarily will have to adhere to their instructions as we have no jurisdiction over this equipment other than to handle as they direct.

"I understand you are figuring on loading some of the cars we are placing at docks to be unloaded, with commodities destined to points in Mexico.

"It is hoped you will not take this action as we cannot accept the cars loaded for points in Mexico without the authority of officials of the lines delivering the cars to us.

"If you can secure such authority from delivering lines we will be very glad to handle in the usual way, otherwise such cars will be held subject to your account as the Missouri Pacific will not accept them from us in interchange.

"Will you kindly acknowledge receipt and understanding of these instructions?"

It is alleged that respondent Port Isabel & Rio Grande Valley Railway specifically refused transportation of cars [fol. 20] that are loaded and specifically refused to permit commodities moving through the Port of Brownsville to be loaded in cars that are made empty at the Port of Brownsville and which were available for their transportation to interchange with the Mexican Railways in the City of Brownsville.

VIII

It is alleged that this action on behalf of the Executive Vice-President of the respondent Missouri Pacific lines is in line with a consistent policy being pursued with respect to the Port of Brownsville which developed wholly after the commerce began to move through that port for transshipment to and from old Mexico. It is specifically alleged that said respondent Missouri Pacific lines has acted with a deliberate design for the purpose of diverting the tonnage from the Port of Brownsville to other gateways so that they will thereby enjoy longer rail hauls on the traffic from such ports as Houston and Corpus Christi, Texas. Thus respondent Missouri Pacific lines is specifically refusing to abide by its lawfully published tariffs on file with the Inter-

state Commerce Commission and is declining and refusing to furnish equipment for the transportation of interstate commerce as provided by the terms and provisions of lawfully published and established charges on file with the Interstate Commerce Commission.

IX

It is alleged that respondent Missouri Pacific Lines specifically advised shippers and consignees residing in old Mexico, particularly at Monterrey in the State of Nuevo Leon, Mexico, that the commodities could not move through [fol. 21] the Port of Brownsville because equipment would not be available for its transshipment.

X

It is alleged that the representative of the Port of Brownsville made a trip to Mexico and made arrangements for the leasing of equipment in Mexico for transshipment of the commodities in question between Matamoras and the Port of Brownsville. It is further specifically alleged that respondent, Missouri Pacific lines, advised the parties involved that the equipment would not be switched when it arrived at Matamoras in the State of Tamaulipas, Mexico. It is alleged that this action on behalf of respondent, Missouri Pacific Lines, resulted in the diversion of this tonnage to other gateways and other ports to the great detriment and loss of the Port of Brownsville and petitioners Lallier and Philen.

XI

It is specifically alleged that respondent Missouri Pacific Lines, through an agent located in Monterrey in the State of Nuevo Leon, Mexico, which agent is under the direct control and supervision of the Executive Vice President, Safford of the respondent Missouri Pacific Lines, Houston and under direct control and supervision of the traffic department of respondent Missouri Pacific Lines at Houston, circulated letters endeavoring to influence interested parties in Mexico to divert their shipments from Brownsville to other ports, particularly circulating false information with respect to the charges of handling the traffic through the Port of Brownsville; specifically advising interested shippers falsely that the switching charge per ton 2,000 pounds at

Brownsville was $12.38, whereas the lawful switching charge [fol. 22] amounts to $11.25 per carload with no limitation on the weight ordinarily covering 50 tons per car. This false information was compared with the cost of handling the traffic through the Port of Corpus Christi and thence by railroad to Laredo, Texas. In calculating the charges at Corpus Christi, they were falsely stated at less than legal and lawful charges. At Corpus Christi, the false information circulated states that charges per ton were 2½c, whereas in fact, the 2½c charge is per 100 pounds. Further that the freight rate applicable on coke from Corpus Christi to Laredo is 14c per ton of 2000#, whereas, the correct rate is 14c per cwt. Said representative, under the direct supervision of the officers of the respondent Missouri Pacific Lines, specifically stated in the letter circulated to shippers interested in using the Port of Brownsville the following:

"I am waiting to hear from our representative in London who is to give us rate from European ports to Corpus Christi and Brownsville with the hopes that this gentleman will obtain a better rate to Corpus Christi than to Brownsville, thereby insuring the transshipment of this coke at that port. As soon as I hear of this rate I shall gladly pass it on to you."

The statement above quoted specifically shows that the representatives of the Missouri Pacific Lines throughout foreign countries and throughout America, are specifically soliciting and endeavoring to arrange for the movement of the traffic through other ports and other gateways.

Copy of said letter of the Missouri Pacific Lines translated from Spanish into English is attached hereto as Appendix "A" and made a part hereof as though fully copied herein.

XII

It is specially alleged that the shippers, consignees and the petitioners herein have, at all times, tendered the com- [fol. 23] merce to the respondents and have expressed their willingness and readiness to pay lawful charges for the transportation here involved. Petitioners have particularly been ready and willing to pay the charges as provided in the tariffs voluntarily published by respondents for transportation of these commodities between the Port of Brownsville, and the interchange point for delivery to Matamoras in the State of Tamaulipas, Mexico.

XIII

It is alleged that all commerce moving to or from the Port of Brownsville and the Nation of Mexico is interstate commerce and as such is subject to the provisions of the Interstate Commerce Act, Title 49, U. S. C. A.

XIV

It is specifically alleged that respondents are denying to the Port of Brownsville and the petitioners herein equal opportunity to move their traffic under interstate rates and charges lawfully on file with the Interstate Commerce Commission for the express purpose and design of diverting the traffic from the Port of Brownsville to other ports and other gateways. It is further specifically alleged that respondent Missouri Pacific Lines is furnishing the equipment and permitting the traffic to move through other gateways and other ports under the identical interstate freight rates and tariffs which are on file with the Interstate Commerce Commission.

XV

It is alleged that respondent Missouri Pacific Lines is in possession of adequate equipment and now owns and controls in the community of Brownsville and at connecting points with the railways of Mexico adequate facilities for the handling of all the traffic herein described and for the handling of all future traffic which may hereafter be tendered to them.

[fol. 24]

XVI

It is alleged that unless the relief prayed for herein is granted that petitioners and the Port of Brownsville will have their entire investment destroyed; that they will not be able to meet their fixed charges and expenses of running the port; that they will lose annually an estimated amount of $125,000.00 in revenue, that would accrue as port charges from the steamship lines, from the commodities and from other interested parties. It is alleged that petitioners Lallier and Philen will have their business at Brownsville destroyed and that they each will lose annually approximately $25,000.00 in revenue which they might reasonably expect from the traffic already committed for movement through the Port of Brownsville and which might reasonably be expected to move in the future.

XVII

Petitioners allege that unless relief herein prayed for is granted that their investments will be destroyed; that they will lose revenue and charges by reason of the diversion of the traffic to other ports and gateways that cannot be retrieved from any source; that they will be irreparably damaged to the extent of $175,000.00 per annum; that there is no adequate remedy provided by law by which petitioners may proceed against respondents to obtain the transportation of the commodities herein particularly set out other than through the granting by this Court of a writ of mandamus against respondents commanding such respondents to furnish adequate and sufficient cars and necessary facilities for the transportation of the property herein described and commanding said respondents to transport said traffic to interchanges with the railways of Mexico in all things similar to the interchange of traffic at all other gateways, particularly Laredo, Texas. Petitioners respectfully and earnestly show to the Court that without the granting of [fol. 25] the writ of mandamus hereinafter prayed for the Port of Brownsville will be irreparably and permanently injured by the diversion of the traffic to other ports and gateways and by the perfecting of arrangements for its handling through other ports and gateways that cannot be readily changed so as to protect the interest of the Port of Brownsville. Petitioners particularly allege that the Port of Brownsville has spent large sums of money in the development of this traffic and that they have obtained definite commitments for its movement through the Port of Brownsville, all of which will be forever lost unless arrangements can be made for its transportation between Matamoras in the State of Tamaulipas, Mexico, to the Port of Brownsville in Cameron County, Texas, and unless arrangements can be made and facilities and equipment furnished for the transportation of the commodities from the Port of Brownsville to a connection with the railways of Mexico in the City of Matamoras, State of Tamaulipas, Mexico. It is specifically alleged that respondent Missouri Pacific Lines is furnishing its equipment for such transportation and such interchange at the gateway of Laredo and that said respondent is specifically soliciting a change in the routing of the traffic from Brownsville to Laredo and from Brownsville to the ports of Corpus Christi and Houston for the specific purpose of permanently injuring the Port of

Brownsville. It is specifically alleged that respondent Missouri Pacific Lines will furnish the necessary equipment and facilities for the movement of the identical traffic here involved via Corpus Christi and Laredo to Mexico or from Mexico via Laredo to Corpus Christi and at the same time said respondent is refusing and declining and has refused and declined to furnish equipment and facilities for the transportation of the same identical commodities through Brownsville and Matamoras to and from the same origins and destinations in the nation of Old Mexico.

[fol. 26] XVIII

Petitioners alleged that the acts of respondents herein described are preventing them from having interstate traffic moved by common carriers subject to the Interstate Commerce Act at the same rates and charges and under the same terms and conditions under which respondents are transporting the identical traffic for other shippers and other gateways.

Wherefore, petitioners respectfully pray that this Honorable Court grant an order for the issuance of a writ of mandamus commanding said respondents to move and transport the traffic herein described and to furnish adequate and sufficient cars and all other necessary facilities for its transportation to and from and between Matamoras, Tamaulipas, Mexico, and the Port of Brownsville, Cameron County, Texas, and commanding said respondents to show cause, if any there be, why a peremptory writ of mandamus should not issue requiring said respondents to continue to furnish for all times in the future adequate and sufficient equipment and necessary facilities for the transportation of the commodities herein described to and from and between Matamoras, Tamaulipas, Mexico, and the Port of Brownsville, Cameron County, Texas. Petitioners further pray for such other and general relief to which they may be entitled in the premises.

Respectfully submitted, Brownsville Navigation District of Cameron County, Texas, F. A. Lallier, J. G. Philen, Jr., by Rentfro & Cole, of Brownsville, Texas, Attorneys for Petitioners. A. L. Reed, of Callaway & Reed, Dallas, Texas, of Counsel.

[fol. 27] *Duly sworn to by W. E. McDavitt et al. Jurats omitted in printing.*

[fol. 28] APPENDIX "A" TO PETITION

Translated Copy

Missouri Pacific Lines

Apartado 201

Monterrey, N. L. September 10, 1936.

Cia Fund. de F. y A. de Monterrey, S. A., Monterrey, N. L.

Attention Don Agapito Longoria

MY DEAR SIRS:

In reference to verbal and telephonic conversation that I have had with your Mr. Longoria, I take great pleasure to [fol. 29] announce that the following data has been compiled in connection with the projected shipment of coke from Europe.

Charges in Brownsville:

Wharfage per ton of 2,000#	Dls. 0.30
Switching from Brownsville to our Lines per ton of 2,000#	Dls. 8.91
Switching from our Lines to Bridge per ton of 2,000#	Dls. 3.47
Total bridge charges per ton of 1,000 Kilos	Dls. 0.23½

In case this ship is unable to discharge directly into railway cars, there will be a warehouse charge, the amount of which has not been determined by the Port Administrators. Also if the ships that are discharging are not equipped with cranes, there will be an additional charge for handling.

Charges in Corpus Christi:

Wharfage per ton of 2,000#	Dls. 0.25
Handling charge per ton of 2,000#	Dls. 0.02½
Freight rate from Corpus to Laredo per ton of 2,000#	Dls. 0.14
Bridge Toll in Laredo per ton of 1,000 Kilos	Dls. 0.23½

Charges in Houston:

Wharfage per ton of 2,000#	Dls. 0.25
Handling per ton of 2,000#	Dls. 0.02½
Freight rate from Houston to Laredo per 100#	Dls. 0.36

Referring to the facilities at the Port of Brownsville, please be advised that we will furnish empty railroad cars for said port to the best of our ability, the same conditions [fol. 30] existing from the National Railways of Mexico, all of which signifies that upon receipt of a large shipment of coke, it will be impossible to haul the entire shipment, thereby necessitating our leaving part of the cargo to wait until more equipment can be gathered to load it.

In Corpus Christi there are more facilities to supply equipment besides the fact that the port is also equipped with the necessary gear to effect transhipment from the ship to railway cars.

I am waiting to hear from our representative in London who is to give us rate from European ports to Corpus Christi and Brownsville with the hopes that this gentleman will obtain a better rate to Corpus Christi than to Brownsville, thereby insuring the transhipment of this coke at that port. As soon as I hear of this rate, I shall gladly pass it on to you.

Thanking you for this opoprtunity you have given us to supply you with these rates and other information and awaiting to be favored with your shipments, I remain.

(S.) O. Gracia Corral.

IN UNITED STATES DISTRICT COURT

[Title omitted]

WRIT TO SERVE COPY OF ORDER FOR HEARING—Filed December 19, 1936

The President of the United States to the Marshal of the Southern District of Texas, Greeting:

You Are Hereby Commanded to Serve The St. Louis, Brownsville and Mexico Railway Company, Debtor, Guy [fol. 31] A. Thompson, Trustee of Houston, Texas, with the accompanying certified copy of Order for a Hearing on Application for Mandamus, and Copy of Application for Writ of Mandamus, filed December 11th, 1936.

Herein Fail Not, and due return of this writ make.

Witness the Honorable Thomas M. Kennerly Judge of the District Court of the United States, for the Southern District of Texas, and the seal of the District Court of the

United States for the Southern District of Texas, at Brownsville, this 11th day of December, A. D. 1936.

L. C. Masterson, Clerk, U. S. District Court, S. D. T., by F. A. Hinojosa, Deputy. (Seal.)

MARSHAL'S RETURN

Received this writ on the 14th day of December, 1936 and executed the same on the 14th day of December, 1936, by delivering to St. Louis, Brownsville & Mexico Railway Company, through H. R. Safford, Ex-vice President in person, at Houston, Texas in my District the accompanying copy of Order for hearing on application for mandamus and copy of application for Writ of Mandamus Returned unexecuted as to Guy A. Thompson.

Certified by the Clerk of this Court.

M. F. Hammond, U. S. Marshal, Southern District of Texas, by C. V. Kern, Deputy.

[fol. 32] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

WRIT TO SERVE COPY OF ORDER FOR HEARING—Filed December 21, 1936

The President of the United States to the Marshal of the Southern District of Texas, Greeting:

You are Hereby Commanded to Serve Port Isabel and Rio Grande Valley Railway Company of Brownsville, Texas with the accompanying certified copy of Order for a Hearing on Application for Mandamus and copy of Application for Writ of Mandamus, filed December 11th, 1936.

Herein Fail Not, and due return of this writ make.

Witness the Honorable Thomas M. Kennerly Judge of the District Court of the United States, for the Southern [fol. 33] District of Texas, and the seal of the District Court of the United States for the Southern District of Texas, at Brownsville, this 11th day of December, A. D. 1936.

L. C. Masterson, Clerk, U. S. District Court, S. D. T., by F. A. Hinojosa, Deputy. (Seal.)

MARSHAL'S RETURN

Received this writ on the 12th day of December, 1936 and executed the same on the Dec. 14, day 1936 by delivering to Mose Hill, The President of the within named railway in person, at Bay View Citrus Grove, in my District the accompanying copy of Writ to Service copy.

Certified by the Clerk of this Court.

M. F. Hammond, U. S. Marshal, Southern District of Texas, by Ernest E. Sadler, Deputy.

[File endorsement omitted.]

[fol. 34] EXHIBIT

Order on Petition for Leave to Prosecute Mandamus Proceedings, etc.

Filed March 17, 1937.

No. 952. Law

(Order No. 709)

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

In Proceedings for the Reorganization of a Railroad. No. 6935

Order

On Petition of Brownsville Navigation District of Cameron County, et al. for Leave to Prosecute Mandamus Proceedings Against Trustee in the United States District Court for the Southern District of Texas

This matter comes before the Court on petition of Brownsville Navigation District of Cameron County, Texas and others, seeking leave of this Court for authority to prosecute against Guy A. Thompson, Trustee, St. Louis, Brownsville & Mexico Railway Company, Debtor, mandamus proceedings heretofore instituted in the United States District Court for the Southern District of Texas seeking to compel Trustee to furnish certain car supply for the handling of

freight between the Port of Brownsville and point or points within the Republic of Mexico.

From copy of the petition filed in the United States District Court for the Southern District of Texas, and attached [fol. 35] as an exhibit to the petition under consideration, it appears that the port is served exclusively by a line of railroad some twenty-six miles in length, known as Port Isabel & Rio Grande Valley Railway Co., which Railway Company, for a tariff charge of $8.10 per car, holds itself out to handle freight from said port to Trustee's interchange within the City of Brownsville, and that Trustee has on file tariffs providing a charge of $3.15 per car for transportation from said interchange point to the International Bridge between the Cities of Brownsville, Texas, and Matamoros, Mexico. It is alleged that the Port Isabel Company has no adequate car supply, and that Trustee, in failing and refusing to furnish equipment for the transportation in question, is disregarding its legal obligations, and discriminating against the Port of Brownsville in favor of certain other Texas ports or gateways. The relief sought in the proceedings before the United States District Court in the Southern District of Texas is "an order for the issuance of a writ of mandamus commanding respondents to move and transport the traffic herein described and to furnish adequate and sufficient cars and all other necessary facilities for its transportation to and from and between Matamoras, Tamaulipas, Mexico, and the Port of Brownsville, Cameron County, Texas." The Port Isabel Company is named as joint respondent in the proposed suit. It is not clear whether the St. Louis, Brownsville & Mexico Railway Co. is intended to be named as a respondent, but if so, the right to proceed by mandamus against the Debtor Company should be denied.

It is contended before this Court by counsel for petitioners that the matters alleged in the petition are such as to require no administrative ruling of the Interstate Commerce Commission as a prerequisite to any suit, and that the relief sought is merely to compel Trustee to comply with his legal tariff obligations in his operation of the properties of the St. Louis, Brownsville & Mexico Railway Co. as a common carrier.

[fol. 36] It is conceded by the parties that under the decision in Ex Parte Baldwin, 291 U. S. 610, this Court may either retain exclusive jurisdiction or may grant permis-

sion to proceed with the suit in the United States District Court for the Southern District of Texas, and in support of the latter course, counsel for petitioners emphasize the convenience in subpoenaing and producing witnesses and the desirability of determining in the same proceeding the respective obligations of Trustee and of Port Isabel & Rio Grande Valley Railway Co.

And the Court being fully advised in the premises, and finding that the rights of the respective parties can be more conveniently determined in the United States District Court for the Southern District of Texas, Now It Is Accordingly Ordered:

That petitioners be and they hereby are authorized to proceed with said mandamus proceedings now pending in the United States District Court for the Southern District of Texas without prejudice to any defense that the St. Louis, Brownsville & Mexico Railway Co. might urge if it, instead of the Trustee, were operating the properties of said company, and reserving in this Court the exclusive jurisdiction to enforce and carry out any judgment against Guy A. Thompson, Trustee, St. Louis, Brownsville & Mexico Railway Co. that may be entered in said proceedings in the United States District Court for the Southern District of Texas. The right to proceed against the Debtor Company, if sought, is denied.

Geo. H. Moore, United States District Judge.

Dated Jan. 20th, 1937.
Filed Jan. 20, 1937. Jas. J. O'Connor, Clerk.

[fol. 37] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PLEA OF GUY A. THOMPSON, TRUSTEE, TO THE COURT'S JURISDICTION—Filed Jan. 30, 1937.

Comes now Guy A. Thompson, Trustee of the St. Louis, Brownsville and Mexico Railway Company, Debtor, heretofore served with copy of the petition of complainants in this cause and with copy of an order entered by this Court to appear before this Court at Houston, Texas, on the 4th day of January, 1937 and show cause why the Writ

of Mandamus applied for by petitioners should not be granted, and appearing at this time for the sole purpose of presenting, this plea, and entering no other appearance in this cause of any character, and without waiving service of citation or other process upon him, respectfully shows to the Court that this Honorable Court ought not to take or [fol. 38] entertain jurisdiction of this cause, for all and each of the following reasons, to-wit:

I.

That in their petition, complainants, styling themselves "Port of Brownsville," complain of the fact that this respondent, who is now operating all of the properties of The St. Louis, Brownsville and Mexico Railway Company under and by authority of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, has refused, and is now refusing, to supply, upon reasonable demand, to customers of complainants an adequate number of railroad cars of different types for use in the transportation of various types of merchandise between the docks of the Port of Brownsville and the City of Matamoros, across the international boundary line, in the State of Tamaulipas, Republic of Mexico—such transportation by rail necessarily passing, in part, over a portion of the line so operated by this respondent; charging that this respondent, in the past, has furnished such cars to its patrons for transportation between Brownsville, Texas and Matamoros, Mexico, and has furnished and is furnishing cars to other of its patrons for the transportation of like merchandise between Corpus Christi, Texas and points in Mexico, through what is known as the Laredo gateway; and charging that this respondent is purposely and deliberately discriminating in favor of the Laredo gateway and against the Brownsville-Matamoros gateway.

This respondent, therefore, avers that the question arising in this case, necessary for a decision in order to achieve a just and lawful determination of the controversy, is whether or not this respondent has inaugurated, adopted or promulgated, and intends to maintain, enforce or con- [fol. 39] continue in operation, a rate, rule, practice, regulation or custom which is unjust or discriminatory to complainants.

Respondent avers that the proper decision of such a question depends upon a great complexity of factors, and necessitates the hearing of competent proof relating to the entire system of furnishing and allocating various types of railroad cars by common carriers operating in the southwestern part of the United States, the rules and agreements made, entered into and acted upon by such carriers in reference to the supply, allocation and interchange of such cars, the rates charged by rail carriers to their patrons for such service, the varying conditions bearing upon or affecting such supply, allocation and interchange, and the revenues and expense incident to the performance of such service. That under laws of the United States now in force the determination of whether or not such a rate, regulation, rule or practice is unreasonable or is unjustly discriminatory must first be submitted to and determined by the Interstate Commerce Commission under appropriate sections of what is commonly known as the Interstate Commerce Act; that by the terms of said Act, the field of interstate commerce, as therein defined, was by the Congress of the United States definitely committed to said Interstate Commerce Commission, and appropriate provisions made for the inquiry by said Commission into the reasonableness and propriety of rates, rules, regulations and practices in and affecting transportation by rail in such commerce; that while under the laws of the United States and the decisions of the Courts construing said laws, any decision of the Interstate Commerce Commission may be reviewed by a Court of the United States having jurisdiction of the subject matter of the controversy and of the parties thereto, nevertheless, a complaint filed with and presented to the Interstate Commerce Commission, a hearing of the facts pertinent to said [fol. 40] complaint by the commission, a decision by said Commission and the entry by said Commission of an order or orders determinative of the controversy, is an indispensable prerequisite to any resort, in matters of this kind, by either shippers or carriers, to the Courts; and further that the nature of the pertinent evidence, and its complexity and technical character, are such as to require, for a proper determination, consideration by a body of experts such as the members of said Commission.

II-

That although complainants, in their bill, allege that this respondent and his co-respondent, Port Isabel and Rio Grande Valley Railway Company, and the Brownsville & Matamoros Bridge Company and the National Railways of Mexico have published joint tariffs for the handling of traffic by rail across the international boundary between the United States and Mexico at Brownsville, Texas, and have offered to handle such traffic for the public generally in accordance with said tariffs, said allegations are erroneous and untrue; that, in truth and in fact, this respondent has not published nor joined in the publication of, nor concurred in, any joint tariff for the through transportation of merchandise by rail between Brownsville and Mexico or between points on the respondent's lines in the United States and points in Mexico, nor in the publication of any tariff providing through routes for such transportation; neither has this respondent acquiesced or concurred in nor acted upon the publication of any such joint or through route by any other person, firm or corporation. This respondent avers that, in truth and in fact, each and all of the tariffs published, promulgated, concurred in and acted upon by him stipulate charges for the transportation of merchandise from points on his line, or on the lines of his American connections, to Brownsville, Texas, and no fur- [fol. 41] ther, or, beginning at Brownsville, Texas, to points on or beyond respondent's line and not in Mexico; that, by a separate tariff, what is known as "switching charges" are published for the handling, by this respondent alone, at Brownsville, Texas, of freight that may be tendered to respondent for movement to or from industries or tracks on its line and connections, or, between connections where this respondent acts as intermediate carrier, all within the switching limits of Brownsville, Texas; that a separate tariff is promulgated by the Brownsville & Matamoros Bridge Company, a corporation which is not controlled by this respondent, stipulating charges for the movement of traffic, by it and over its rails and bridge, between the junction of its line with the line of this respondent at Brownsville, Texas, and the junction of its line with the rails of the National Railways of Mexico in Matamoros, Mexico; that his co-respondent, Port Isabel & Rio Grande Valley

Railway Company, has likewise published and promulgated a tariff showing switching charges for the transportation by it of freight between the junction of its line with that of this respondent and the docks of complainant; that the National Railways of Mexico have published and promulgated and maintain tariffs, showing charges for the transportation of freight over its lines within the switching limits of Matamoros and between Matamoros and other points in the Republic of Mexico, such as Monterrey, San Luis Potosi and Mexico City; and that the total cost of transportation over the lines of these different carriers is and must be determined by adding together the separately established charges stipulated by each of said carriers, including the switching charges of this respondent, his co-respondent and the Brownsville & Matamoros Bridge Company, and the line haul charge of said National Railways.

[fol. 42] Wherefore, this respondent says that petitioners in this cause, do not, in fact, complain of the violation or improper application by respondents of an established rate, rule, regulation or practice which complainants allege is fair upon its face, lawful and satisfactory to them; but, in truth and in fact, complainants, charge that the rates, rules, regulations and practices of this respondent, are, as to complainants, unjust, unreasonable and discriminatory and this respondent avers that for the determination of such issue preliminary resort must be had to the Interstate Commerce Commission.

II-

This respondent would further show to the Court that there is not involved in this controversy the mere construction by this Court of any tariff, rate, rule, regulation or practice; that complainants have, in fact, correctly cited and in general have fairly described in their petition the tariffs which govern and apply to the handling of traffic by rail between the Port of Brownsville and points in Mexico, including the City of Matamoros; that said tariffs are clear and unambiguous in their terms, and that no dispute should or probably will arise as to their legal effect; that complainants do not in this action seek redress in damages for alleged wrongs done in the past, but that the only relief sought by complainants is a Writ of Mandamus, issuing

out of this Court to respondents, directing respondents in particular detail as to their future course of conduct.

The task of supplying and distributing empty railroad cars to prospective shippers is one that is and will continue to be attended with frequent and radical changes in conditions throughout the territory served by respondents—such changes being chiefly caused by the changing needs of prospective shippers and the varying supply in different [fol. 43] locations, of diverse types of railroad equipment. And this respondent, therefore, says that any order, judgment or writ entered or issued by this Court, attempting to regulate or require the furnishing of cars by this respondent and his co-respondent to complainants in the future would be binding only upon the parties hereto, whereas an order of such Commission would bind all parties involved; and any order or writ of this Court would be affected, inevitably and vitally, by substantial changes which will occur in such conditions from time to time; and by its inflexibility would further complicate the general problem of supplying and distributing cars among the shipping public, generally, in the whole southwestern territory; and would become harsh and inequitable as to these respondents; or, on the other hand, with changing conditions, would become futile and ineffective, as failing to meet the needs of complainants and other shippers in complainants' class. On the other hand, the Interstate Commerce Commission, created and now functioning as a fact finding body and expert administrative agency, can, with ease and rapidity, hear and determine facts bearing upon and affecting future changes and seasonal and periodic fluctuations in the needs of the shipping public in various portions of the whole country and the available supply of equipment and its location; and, having made the proper order in this controversy at the present time, can, at any time in the future, set aside said order, or amend or modify the same in such fashion as will take care of new conditions as they may arise; and that the said Interstate Commerce Commission is so organized that it can make such amendment or modification as may be necessary in the premises with greater ease and facility, and with a continuing and better understanding of the technical factors involved, then can be obtained by any party to this cause through the formal requirements of a proceeding in this or any other Court.

[fol. 44] IV

This respondent would further show to the Court that it is not true, as alleged by complainants, that there is no adequate remedy provided by law by which petitioners may obtain relief form the difficulties described in their petition; that, in truth and in fact, petitioners have ready at hand a legal remedy to which they can resort, which will adequately and satisfactorily relieve and eliminate all of the difficulties now apparently confronting them, as described in their petition, in this: that petitioner, the Brownsville Navigation District of Cameron County, Texas, is a Navigation District duly incorporated under the laws of the State of Texas, as set forth in the beginning of paragraph I of the Bill of Complaint against respondents; that, under and by virtue of the terms of the Act of the Legislature of the State of Texas, which created said Navigation District, the said District has lawful power and authority, to accumulate, through the issuance and sale of bonds or by other lawful and proper means, a sufficient sum of money to purchase, provide and equip itself with an adequate supply of railroad cars, of such types and classes as may be needed for its business in which to transport between its docks near Brownsville, Texas, over the lines of respondents and others in the line of route, and Matamoros and other points in Mexico, all freight arriving at said port by ship, or intended for transportation from said port by ship; and that, as shown in the petition of complainants, said Navigation District has issued and sold bonds in sums amounting to an approximate total of $3,500,000.00 for the construction and equipment of the ship channel, docks and terminals; and that it is entirely feasible and practicable for said petitioner to raise, by issuance of additional bonds, a sufficient sum of money to supply itself with an entirely adequate number of railroad cars to handle all business coming through its port, either to or from the City of Matamoros and other points in the Republic of Mexico.

[fol. 45] An adequate supply of such cars could be secured by the investment of about $500,000.00; and this respondent avers that such difficulties as now confront complainants, as alleged in their petition herein, arise from the fact that said Navigation District has neglected to provide itself with certain indispensible facilities, to-wit: freight cars.

V

What complainants actually pray this Court to do is to command the respondents to place their cars in a service which necessarily involves their departure from this country and their entry into the Republic of Mexico, where they cannot be controlled by either the respondents or the Court, and where they will be subject to a different system of laws and to foreign Courts; and wholly beyond the jurisdiction of this Court and of the Interstate Commerce Commission.

The terms and requirements of the Interstate Commerce Act do not extend at all to foreign commerce, except so far as the same takes place within the limits of the United States.

And neither under that Act nor otherwise does this Court have jurisdiction to compel this respondent to send his property out of this country, and into a foreign country. If any exception there be, which is denied, to the averment last made, it would apply only to cases where necessary to relieve against a discriminatory practice; and in such matters, as above alleged, the Commission and not the Court has primary and exclusive jurisdiction.

Wherefore, Premises Considered, this respondent prays that this Court take no jurisdiction of this controversy, [fol. 46] except to enter an order dismissing the Bill of Complaint herein for lack of jurisdiction.

Respectfully submitted, Guy A. Thompson, Trustee of the St. Louis, Brownsville, and Mexico Railway Company, Debtor, by E. H. Crenshaw, Jr., R. H. Kelley, Andrews, Kelley, Kurth & Campbell, Attorneys for said Respondent.

Duly sworn to by H. Booth. Jurat omitted in printing.

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLEA OF PORT ISABEL & RIO GRANDE VALLEY RAILWAY TO JURISDICTION—Filed February 12, 1937

Comes now Port Isabel & Rio Grande Valley Railway and appearing at this time for the sole purpose of presenting

this plea, and entering no other appearance in this cause of any character and without waiving service of citation or other process upon it, respectfully shows to the Court that this Honorable Court ought not to take or entertain jurisdiction of this cause, for the following reasons, to-wit:

That in their petition, complainants, styling themselves "Port of Brownsville" complain of the fact that this respondent has refused and is now refusing, to supply, upon reasonable demand, to customers of complainants an adequate number of railroad cars of different types for use in the transportation of various types of merchandise between the docks of the Port of Brownsville and the City of Matamoros, across the International Boundary Line, in the State of Tamaulipas, Republic of Mexico—such transportation by rail necessarily passing in part, over a portion of this respondent's line; charging that another respondent herein, in the past, has furnished such cars for transportation between Brownsville, Texas and Matamoros, Mexico and has furnished and is furnishing cars to other parties for the transportation of like merchandise between Corpus Christi, Texas and points in Mexico, through what is known as the Laredo gateway; and charging that said other respondent is purposely and deliberately discriminating in favor of the [fol. 48] Laredo Gateway, and against the Brownsville-Matamoros Gateway.

This Respondent, therefore, avers that the question arising in this case, necessary for a decision in order to achieve a just and lawful determination of the controversy, is whether or not a respondent has inaugurated, adopted or promulgated and intends to maintain, enforce or continue in operation, a rate, rule, practice, regulation or custom which is unjust or discriminatory to complainants.

Respondent avers that the proper decision of such a question depends upon a great complexity of factors and necessitates the hearing of competent proof relating to the entire system of furnishing and allocating various types of railroad cars by common carriers, operating in the southwestern part of the United States, the rules and agreements made, entered into and acted upon by such carriers in reference to the supply, allocation and interchange of such cars, the rates charged by rail carriers to their pa-

trons for such service, the varying conditions bearing upon or affecting such supply, allocation and interchange and the revenue and expense incident to the performance of such service. That under laws of the United States now in force the determination of whether or not such a rate, regulation, rule or practice is unreasonable or is unjustly discriminatory must first be submitted to and determined by the Interstate Commerce Commission under appropriate sections of what is commonly known as the Interstate Commerce Act; that by the terms of said Act the field of interstate commerce, as therein defined was by the Congress of the United States definitely committed to said Interstate Commerce Commission and appropriate provision made for the inquiry by said Commission into the reasonableness and propriety of rates, rules, regulations and practices in and affecting transportation by rail in such commerce; that while under [fol. 49] the laws of the United States and the decisions of the Courts construing said laws, any decision of the Interstate Commerce Commission may be reviewed by a Court of the United States having jurisdiction of the subject matter of the controversy and of the parties thereto, nevertheless, a complaint filed with and presented to the Interstate Commerce Commission, a hearing of the facts pertinent to said complaint by the Commission, a decision by said Commission and the entry by said Commission of an order or orders determinative of the controversy, is an indispensable prerequisite to any resort, in matters of this kind, by either shippers or carriers, to the Court; and further that the nature of the pertinent evidence, and its complexity and technical character, are such as to require, for a proper determination, consideration by a body of experts such as the members of said Commission.

II

That although complainants, in their bill, allege that this respondent and its co-respondent, Guy A. Thompson, Trustee and the Brownsville & Matamoros Bridge Company and the National Railways of Mexico have published joint tariffs for the handling of traffic by rail across the International boundary between the United States and Mexico at Brownsville, Texas, and have offered to handle such traffic for the public generally in accordance with said tariffs, said allegations are erroneous and untrue; that, in truth and in fact,

this respondent has not published nor joined in the publication of, nor concurred in, any joint tariff for the through transportation of merchandise by rail between Brownsville and Mexico or between points on the respondent's line in the United States and points in Mexico, nor in the publication of any tariff providing through routes for such transpor-
[fol. 50] tation; neither has this respondent acquiesced or concurred in nor acted upon the publication of any such joint or through route by any other person, firm or corporation. This respondent avers that, in truth and in fact, each and all of the tariffs published, promulgated, concurred in and acted upon by it, stipulate charges for the transportation of merchandise from points on its line or on the lines of its American connections to Brownsville, Texas, and no further, or beginning at Brownsville, Texas to points on respondent's line and not in Mexico; that by a separate tariff, what is known as "switching charges" are published for the handling, by this respondent alone, at Brownsville, Texas, of merchandise delivered to respondent at said point and intended for a Brownsville industry or another carrier connecting with respondent's line at Brownsville; that a like separate tariff is promulgated by said co-respondent and the Brownsville & Matamoras Bridge Company, a corporation which is not controlled by this respondent, stipulating charges for the movement of traffic by them and over their rails and bridge, respectively, between the junction of its line with the line of this respondent at Brownsville, Texas and the junction of said Bridge Company's line with the rails of the National Railways of Mexico in Matamoros, Mexico; that the National Railways of Mexico have published and promulgated and maintain tariffs showing charges for the transportation of freight over its lines between Matamoros and other points in the Republic of Mexico, such as Monterrey San Luis Potosi and Mexico City; and that the total cost of transportation over the lines of these different carriers is and must be determined by adding together the separately established charges stipulated by each of said carriers, including the switching charges of this respondent, its co-respondent and the Brownsville and Matamoros Bridge Company, and the line haul charge of said National Rail-
[fol. 51] ways.

Wherefore this respondent says that petitioners in this

cause do not, in fact, complain of the violation or improper application by respondents of an established rate, rule, regulation or practice which complainants allege is fair upon its face, lawful and satisfactory to them; but in truth and in fact, complainants charge that the rates, rules, regulations and practices of this respondent are, as to complainants, unjust, unreasonable and discriminatory; and this respondent avers that for the determination of such issue preliminary resort must be had to the Interstate Commerce Commission.

III.

This respondent further shows to the Court that there is not involved in this controversy the mere construction by this Court of any tariff rate, rule, regulation or practice; that complainants have, in fact, correctly cited and in general have fairly described in their petition the tariffs which govern and apply to the handling of traffic by rail between the Port of Brownsville and points in Mexico, including the City of Matamoros; that said tariffs are clear and unambiguous in their terms, and that no dispute should or probably will arise as to their legal effect; that complainants do not in this action seek redress in damages for alleged wrongs done in the past, but that the only relief sought by complainants is a Writ of Mandamus, issuing out of this Court to respondents, directing respondents in particular detail as to their future course of conduct.

The task of supplying and distributing empty railroad cars to prospective shippers is one that is and will continue to be attended with frequent and radical changes in conditions, throughout the territory served by respondents —such changes being chiefly caused by the changing needs of prospective shippers and the varying supply in different [fol. 52] locations, of diverse types of railroad equipment. And this respondent, therefore says that any order, judgment or writ entered or issued by this Court, attempting to regulate or require the furnishing of cars by this respondent and its co-respondent to complainants in the future would be binding only upon the parties hereto, whereas an order of such Commission would bind all parties involved; and any order or writ of this Court would be affected, inevitably and vitally by substantial changes which will occur in such conditions from time to time; and by its inflexibility would further complicate the general problem of

supplying and distributing cars among the shipping public, generally, in the whole southwestern territory; and would become harsh and inequitable as to said respondents; or on the other hand, with changing conditions, would become futile and ineffective, as failing to meet the needs of complainants and other shippers in complainants class. On the other hand, the Interstate Commerce Commission, created and now functioning as a fact finding body and expert administrative agency, can, with ease and rapidity, hear and determine facts bearing upon and affecting future changes and seasonal and periodic fluctuations in the needs of the shipping public in various portions of the whole country and the available supply of equipment and its location; and having made the proper order in this controversy at the present time, can at any time in the future, set aside said order, or amend or modify the same in such fashion as will take care of new conditions as they may arise; and that the said Interstate Commerce Commission is so organized that it can make such amendment or modification as may be necessary in the premises with greater ease and facility and with a continuing and better understanding of the technical factors involved than can be obtained by any party to this cause through the formal requirements of a proceeding in this or any other Court.

[fol. 53] IV

This respondent further shows to the Court that it is not true as alleged by complainants, that there is no adequate remedy provided by law by which petitioners may obtain relief from the difficulties described in their petition; that, in truth and in fact, petitioners have ready at hand a legal remedy to which they can resort, which will adequately and satisfactorily relieve and eliminate all of the difficulties now apparently confronting them as described in their petition, in this: that petitioner, the Brownsville Navigation District of Cameron County, Texas, is a Navigation District duly incorporated under the laws of the State of Texas as set forth in the beginning of paragraph 1 of the Bill of Complaint against respondents; that under and by virtue of the terms of the Act of the Legislature of the State of Texas, which created said Navigation District the said District has lawful power and authority to accumulate, through the issuance and sale of bonds or by other lawful and proper means, a sufficient sum of money to purchase provide and

equip itself with an adequate supply of railroad cars of such types and classes as may be needed for its business, in which to transport between its docks near Brownsville, Texas, over the lines of respondents and others in the line of route, and Matamoros and other points in Mexico, all freight arriving at said port by ship, or intended for transportation from said port by ship; and that, as shown in the petition of complainants, said Navigation District has issued and sold bonds in sums amounting to an approximate total of $3,500,000.00 for the construction and equipment of the ship channel, docks and terminals; and that it is entirely feasible and practicable for said Petitioner to raise, by issuance of additional bonds, a sufficient sum of money to supply itself with an entirely adequate number of railroad cars to handle all business coming through its port, either to or from the City of Matamoros and other points in the Republic of Mexico. [fol. 54] An adequate supply of such cars could be secured by the investment of a reasonable sum; and this respondent avers that such difficulties as now confront complainants as alleged in their petition herein arise from the fact that said Navigation District has neglected to provide itself with certain indispensable facilities, towit: Freight Cars.

V

What complainants actually pray this Court to do, is to command the respondents to place their cars in a service which necessarily involves their departure from this country and their entry into the Republic of Mexico, where they cannot be controlled by either the respondents or the Court, and where they will be subject to a different system of laws and to foreign Courts, to taxes which will reduce rental for said cars below the reasonable value of their use; and where they will be wholly beyond the jurisdiction of this Court and of the Interstate Commerce Commission.

The terms and requirements of the Interstate Commerce Act do not extend at all to foreign commerce, except so far as the same takes place within the limits of the United States. And neither under that Act nor otherwise does this Court have jurisdiction to compel this respondent to send its property out of this country and into a foreign country. If any exception there be, which is denied, to the averment last made, it would apply only to cases where necessary to relieve against a discriminatory practice, and in such mat-

ters, as above alleged, the Commission and not the Court has primary and exclusive jurisdiction.

Wherefore, Premises Considered, this respondent prays that this Court take no jurisdiction of this controversy ex- [fol. 55] cept to enter an order dismissing the Bill of Complaint herein for lack of jurisdiction.

Respectfully submitted, Port Isabel & Rio Grande Valley Railway, by Baker, Botts, Andrews & Wharton, J. H. Tallichet, Attorneys for said Respondent.

Duly sworn to by Lon C. Hill, Jr. Jurat omitted in printing.

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

Rentfro & Cole, of Brownsville, Texas; A. L. Reed, of Callaway & Reed, of Dallas, Texas; for Relators.

E. H. Crenshaw, Jr., of Kingsville, Texas, R. H. Kelley and Andrews, Kelley, Kurth & Campbell; and J. H. Tallichet and Baker, Botts, Andrews & Wharton, of Houston, Texas; for Respondents.

MEMORANDUM SUSTAINING RESPONDENT'S PLEAS TO THE JURISDICTION—Filed March 16, 1937

Memorandum, March 16, 1937

This is a Mandamus proceeding under Section 49, Title 49, and Subdivision 8 of Section 41, Title 28, U. S. C. A., by the Brownsville Navigation District of Cameron County, Texas, incorporated under the Laws of Texas, with its domicile in Cameron County, Texas, and F. A. Lallier and J. G. Philen, Jr., of Brownsville, Cameron County, Texas, engaged in the stevedore, freight brokerage and forwarding agent business, all claiming to be interested and concerned in the transportation of certain commodities, described in their Petition for Mandamus, to, from, and between Matamoras, Tamaulipas, Mexico, and the Port of Brownsville, Cameron County, Texas, against Guy A. Thompson, of St. Louis, in the State of Missouri, Trustee of the St. Louis, Brownsville and Mexico Railway Company (incorporated under the Laws of Texas) under appointment of the United

States District Court for the Eastern Judicial District of Missouri in a proceeding in Bankruptcy for the reorganization of such Railway Company (Section 77 of the Bank-[fol. 57] ruptcy Act, Section 205, Title 11, U. S. C. A.), (for brevity called Trustee), and the Port Isabel & Rio Grande Valley Railway Company (for brevity called Port Isabel Ry.), organized under the Laws of Texas, with its domicile at Brownsville, Cameron County, Texas, to compel Respondents, i. e., such Trustee and such Port Isabel Ry. quoting from the prayer in Relators' Petition):

"to move and transport the traffic herein described and to furnish adequate and sufficient cars and all other necessary facilities for its transportation to and from and between Matamoras, Tamaulipas, Mexico, and the Port of Brownsville, Cameron County, Texas, and commanding said respondents to show cause, if any there be, why a peremptory writ of mandamus should not issue requiring said respondents to continue to furnish for all times in the future adequate and sufficient equipment and necessary facilities for the transportation of the commodities herein described to and from and between Matamoras, Tamaulipas, Mexico, and the Port of Brownsville, Cameron County, Texas."

In response to an Order requiring them to show cause why Mandamus should not issue, Respondents, without waiving citation or entering their appearance, have appeared specially and solely for the purpose of presenting their Pleas to the Jurisdiction of the Court, the appearance of the Trustee being further subject to an Order of the Court appointing him, entered January 20, 1937. It is not clear that the St. Louis Brownsville and Mexico Railway Company (for brevity called St. L. B. & M. Ry. Co.) is itself made a party to Relators' suit. It has not appeared.

This is a hearing (by agreement on a-fidavits and other documentary evidence) of such Pleas of the Trustee and the Port Isabel Ry.

[fol. 58] Rail traffic from the Port of Brownsville to Matamoras passes from the Port of Brownsville over the tracks of Relator Brownsville Navigation District to the tracks of the Port Isabel Ry., then over the tracks of the Port Isabel Ry. to the City of Brownsville, then for a short distance within the limits of the City of Brownsville over

the tracks of the trustee (St. L. B. & M. Ry. Co.), then for a short distance over the tracks and bridge (crossing into Mexico) of the Brownsville & Matamoras Bridge Company, and then over the tracks of the Mexican National Railway to Matamoras. Traffic from Matamoras to the Port of Brownsville passes in reverse order. (See plat attached to the Affidavit of F. S. Schwinn).

The Port Isabel Ry. has no cars or equipment, or insufficient cars and equipment, suitable for transporting such commodities over its tracks. The same is true as to the Relator Brownsville Navigation District. This suit is for Mandamus to require the Trustee to furnish and supply Port Isabel Ry. and/or Relator Brownsville Navigation District with such cars and equipment.

I have carefully examined and considered the pleadings, evidence, and briefs of the parties, and have reached the conclusion that the matter is one of an administrative nature to be determined by the Interstate Commerce Commission, and that this Court is without Jurisdiction. Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426. Baltimore & Ohio RR. Co. v. U. S., Ex Rel Pitcairn Coal Co., 215 U. S. 480. Mitchell Coal & Coke Co. v. Pennsylvania RR. Co., 230 U. S. 247. Morrisdale Coal Co. v. Pennsylvania RR. Co., 230 U. S. 334. Pennsylvania RR. Co. v. Clark Bros. Coal Mining Co., 238 U. S. 456. Loomis v. Lehigh Valley RR. Co., 240 U. S. 43. Great Northern Ry. Co. v. Merchants' Elevator Co., 259 U. S. 285. Chicago [fol. 59] Rock Island and Pacific v. United States, 284 U. S. 80. Pennsylvania RR. Co. v. Puritan Coal Mining Co., 237 U. S. 121. P. P. Brown & Son v. Louisville & Nashville Ry., — U. S. —, decided January 4, 1937. Macon, D. & S. R. Co. General Reduction Co., 44 Fed. (2d) 501.

It follows that Respondent's Pleas to the Jurisdiction should be sustained.

Let an Order, dismissing the Petition, be prepared and presented.

T. M. Kennerly, Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

DECREE OF DISMISSAL—Filed March 20, 1937

On the 19th day of February, A. D. 1937, came on to be heard the pleas of the Respondent Guy A. Thompson, as Trustee of The St. Louis, Brownsville and Mexico Railway Company, debtor, and of the Respondent Port Isabel & Rio Grande Valley Railway to the jurisdiction of the Court, each and both said pleas having been filed herein in limine, and no other appearance being entered by said Respondents, and thereupon came the said Respondents by their respective Attorneys, R. H. Kelley and J. H. Tallichet, and the Relators, Brownsville Navigation District of Cameron County, Texas, F. A. Lallier and J. G. Philen, Jr., by their Attorneys, A. L. Reed and A. B. Cole, and each and all said parties submitted said pleas and each and all of the issues raised thereby to the Court; and thereupon the Court pro-
[fol. 60] ceeded to hear and consider the said pleas and the evidence in form of affidavits in support of and in opposition thereto and argument of counsel and fully considered the same;

And the Court having taken each and all said matters and issues under advisement and having fully considered the same, did thereafter, on this the 16th day of March, A. D. 1937, in all things sustain each and both the said pleas to the jurisdiction of this Court;

Whereupon it is Considered, Ordered, Adjudged and Decreed by the Court that, for as much as this Court has not jurisdiction of the matters and things alleged in the petition of Relators heretofore filed herein, the said cause be and the same hereby is dismissed, to all of which action of the Court, Relators each duly excepted and gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana.

Signed at Houston, Texas, as of this the 16th day of March, A. D. 1937, but to be entered in the Minutes at the Brownsville Division of this Court.

T. M. Kennerly, Judge.

Approved as to Form:

Andrews, Kelley, Kurth & Campbell, E. H. Crenshaw, Jr., R. H. Kelley, Baker, Botts, Andrews & Wharton, by J. H. Tallichet, A. B. Cole and A. L. Reed, A. L. Reed.

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed March 20, 1937

To the Honorable Judge of Said Court:

Now come Relators, Brownsville Navigation District of Cameron County, Texas, F. A. Lallier and J. G. Philen, Jr. and conceiving themselves aggrieved by the order and decree made and entered in the above entitled cause, do hereby appeal therefrom to the Circuit Court of Appeals for the Fifth Circuit for the reasons specified in the assignments of error, which are filed herewith and pray that this appeal may be allowed, that a citation be issued directed to the respondents, Guy A. Thompson, Trustee of The St. Louis, Brownsville and Mexico Railway Company and the Port Isabel & Rio Grande Valley Railway Company, commanding them, and each of them, to appear before the Circuit Court of Appeals for the Fifth Circuit to do and receive what may appertain to justice to be done in the premises, and that a transcript of record, proceedings and papers upon which said order and decree were made be duly authenticated and sent to the Circuit Court of Appeals for the Fifth Circuit. Pursuant to the rules of such Court in such cases made and provided, Relators further pray that a proper order relating to the security to be required of them be made.

Respectfully submitted, Brownsville Navigation District of Cameron County, Texas, et al., by A. B. Cole, A. L. Reed, Attorneys for Relators.

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed March 20, 1937

May It Please the Court:

Comes now the Brownsville Navigation District of Cameron County, Texas, F. A. Lallier and J. G. Philen, Jr., of Brownsville, Texas, Relators, in connection with their peti-

tion for an allowance of an appeal herein from the order of the Court dismissing the petition for lack of jurisdiction entered on the — day of March, 1937, and assign the following errors in said order and in said findings and conclusions of law embodied in the Court's memorandum opinion dated March 16, 1937. Relators respectfully present to the Court their assignments of error:

1. That the Court erred in holding that the matter involved is one of an administrative nature to be determined by the Interstate Commerce Commission because all questions presented in the pleadings sought to have existing rules, regulations and rates enforced with respect to the transportation of commerce between the port of Brownsville and the interchange with the National Railways of Mexico.

2. That the Court erred in holding that it was without jurisdiction of the matters set forth in the petition of relators because all matters therein described related to the enforcement of existing rules, regulations and rates over which this Court does have jurisdiction.

3. That the Court erred in holding that "this suit is for mandamus to require the trustee to furnish and supply [fol. 63] the Port Isabel Railway and/or relators, Brownsville Navigation District, with such cars and equipment" because said suit was filed seeking mandamus for the purpose of requiring said respondents, including the Port Isabel Railway, to transport commodities between the port of Brownsville and the interchange with the National Railways of Mexico in the same manner and under the same circumstances and conditions that the same identical commodities were being transported through other gateways, particularly Laredo, Texas. The proceeding did not involve, and no order was sought, requiring the furnishing of cars for the Port Isabel Railway. The cars were to be transported by the Port Isabel Railway but they were to be furnished to the shippers and the shippers's agents to whom the respondent carriers were obligated as a matter of law as required by the Interstate Commerce Act to transport the commodities in accordance with their published tariffs.

4. That the Court erred in not holding that the respondents had published tariffs, rules and regulations concerning the transportation of the commodities involved con-

cerning the interchange of equipment with the National Railways of Mexico and interchange of equipment with respondent Fort Isabel & Rio Grande Valley Railway.

5. That the Court erred in holding that the traffic to and from the port of Brownsville was transported over the tracks of relator, Brownsville Navigation District to the tracks of the Port Isabel Railway in that the port of Brownsville is not engaged in the business of common carriage for hire. The only tracks owned by it are industrial tracks serving the docks and warehouse facilities in the port of Brownsville. They are not used to transport commodities [fol. 64] and the transportation service to and from the port of Brownsville is wholly performed by the Port Isabel & Rio Grande Valley Railway and the respondent, The St. Louis, Brownsville and Mexico Railway, Guy A. Thompson, Trustee.

6. That the Court erred in granting the motion to dismiss until it had heard the evidence in its entirety for the reason that the jurisdictional question involved depends upon the established facts with respect to whether or not there are published rates for the transportation of commodities between the port of Brownsville and the interchange with the National Railways of Mexico.

Respectfully submitted, Brownsville Navigation District of Cameron County, Texas, F. A. Lallier and J. G. Philen, Relators, by A. B. Cole, A. L. Reed, Their Attorneys.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL AND FIXING BOND—Filed March 20, 1937

It appearing to the Court that in the above styled cause a petition has been filed for appeal by Relators, Brown-
[fols. 65-70] ville Navigation District of Cameron County, Texas, F. A. Lallier and J. G. Philen, Jr. and that assignments of error have been filed concurrently with the petition of appeal and that such appeal as prayed for should be allowed and granted,

Now, Therefore, It Is Ordered, Adjudged and Decreed by the Court that the appeal prayed for be and the same is hereby allowed and granted to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, from the judgment and decree rendered in this cause and that Relators, Brownsville Navigation District of Cameron County, Texas, F. A. Lallier and J. G. Philen, Jr. give bond with good and sufficient surety in the sum of Two Hundred & Fifty Dollars, conditioned, that they, as appellant, shall prosecute their appeal to effect and answer all damages and costs, if they fail to make good their plea. Such Bond Not to act as Supersedeas.

Dated at Houston, Texas, this 20 day of March, A. D. 1937.

T. M. Kennerly, United States District Judge.

Bond on appeal for $250.00, approved and filed March 23, 1937, omitted in printing.

[fol. 71] In United States District Court for the Southern District of Texas, Brownsville Division

No. 952. At Law

Brownsville Navigation District of Cameron County, Texas, et al., Relators,

versus

The St. Louis, Brownsville and Mexico Railway Company, Guy A. Thompson, Trustee, et al., Respondent.

Bill of Exceptions—Filed March 25, 1937

Be It Remembered that the following is a full, true and correct statement of the evidence adduced and proceedings had upon the hearing of the motion to dismiss for lack of jurisdiction in the above numbered and entitled matter before His Honor, T. M. Kennerly, United States District Judge, on the 19th day of February, 1937, at Houston, Texas.

Appearances:

A. L. Reed, Esq., of Dallas, Texas, and A. B. Cole, Esq., of Brownsville, Texas, appearing for the Relators.

R. H. Kelley, Esq., E. H. Crenshaw, Jr., Esq., J. H. Tallichet, Esq., and J. L. Lockett, Jr., appearing for the Respondents.

Mr. Kelley: In support of the plea to the jurisdiction we have an offer which we have reduced to writing so that [fol. 72] the Court will have a list of the various documents and various affidavits offered. They are all there in that page and there is our brief.

Mr. Reed: Do you have a copy of the brief?

Mr. Lockett: You have a copy, Mr. Reed.

Mr. Reed: I didn't get the brief. I have the affidavits.

Mr. Tallichet: I am not sure, but we have the brief and you can get a copy later.

Mr. Kelley: I think we have it. You check up on it. I think you have a copy of it.

Mr. Reed: No, I haven't got it.

Will the reporter record these offerings by the respondent on the plea of jurisdiction?

The Court: Yes, sir.

(The brief and affidavits of F. S. Schwinn, T. H. Levy and H. Booth were received in evidence, marked "Respondent's Exhibit 1 for identification," and are as follows:)

[fol. 73] February 18, 1937

[Title omitted]

Offer in Evidence by Defendant, Guy A. Thompson, Trustee

At the hearing in the above cause held at Houston, Texas, February 19, 1937, on his plea to the jurisdiction of the Court, the defendant, Guy A. Thompson, Trustee of the St. Louis, Brownsville and Mexico Railway Company, Debtor, offers in evidence each of the following documents, or copies thereof, to-wit:

1. Petition for reorganization of Missouri Pacific Railroad Company, No. 6935, United States District Court, St. Louis, Missouri, dated and filed March 31, 1933.

2. Order of March 31, 1933 approving filing of above petition.

3. Petition for reorganization in same proceeding by The St. Louis, Brownsville and Mexico Railway Company and others, filed May 2, 1933.

[fol. 74] 4. Order of May 2, 1933, approving filing of next above petition.

5. Order of July 26, 1933 in same proceeding confirming appointment of L. W. Baldwin and Guy A. Thompson, Trustee.

6. Order of December 26, 1935, same proceeding, accepting resignation of L. W. Baldwin as Trustee and Guy A. Thompson as sole trustee.

7. Petition of Brownsville Navigation District of Cameron County, Texas, in above proceeding for leave to prosecute this suit, filed December 17, 1936.

8. Order of January 20, 1937, partially granting next above petition.

9. The verified plea to the jurisdiction of this Court, filed by this defendant.

10. Affidavit of F. S. Schwinn.

11. Affidavit of T. H. Levy.

12. Affidavit of H. Booth.

(Signed) E. H. Crenshaw, Jr., R. H. Kelley, Andrews, Kelley, Kurth & Campbell, Attorneys for Defendant, Guy A. Thompson, Trustee.

[fol. 75] RESPONDENT'S EXHIBIT NO. 1

(Petition No. 1)

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

Petition

To the Honorable the Judges of the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri:

The Petition of Missouri Pacific Railroad Company, a railroad corporation organized and existing under the laws

of the State of Missouri, hereinafter referred to as the Debtor, respectfully represents:

First. That the Debtor is a railroad corporation duly organized and existing under the laws of the State of Missouri, and a citizen and resident of said State; and is a common carrier by railroad engaged in the transportation of persons and property in interstate commerce in the States of Missouri, Arkansas, Colorado, Illinois, Kansas, Louisiana and Oklahoma, and is not a street, suburban or interurban electric railway; that during the six months' period immediately preceding the filing of this petition the Debtor has had, and now has, its principal operating office in the City of St. Louis, Missouri, in the Eastern Division, Eastern Judicial District of Missouri.

[fol. 76] Second. That there will become due on April 1, 1933 and within thirty days thereafter, the following:

Interest on obligations of the Debtor, due April 1, 1933, aggregating	$1,110,411.92
Taxes on property of the Debtor which will become subject to a penalty if not paid by April 10, 1933 (approximately)	$1,295,000.00
Principal of, and interest on, obligations of the Debtor, or obligations which constitute a lien upon its property due April 30/May 1, 1933	38,183,918.86
Total	$40,589,330.78

That the Debtor is without funds to pay and discharge the aforesaid obligations as they mature, and on information and belief alleges that it has no means of borrowing or otherwise procuring such funds; that it is unable to meet its debts as they mature, and desires to effect a plan of reorganization pursuant to Section 77 of Chapter VIII of the Acts of Congress relating to Bankruptcy.

Third. That a copy of this petition is this day being filed with the Interstate Commerce Commission.

Fourth. That the filing of this petition was duly authorized by the Debtor by resolution of the Executive Commit-

tee of the Board of Directors of the Debtor, adopted at a meeting thereof duly held on the 31st day of March, 1933.

Wherefore, your petitioner prays that an order may be entered approving this petition as properly filed under Sec- [fol. 77] tion 77, and that it be granted all other further relief to which it may be entitled.

Missouri Pacific Railroad Company, by L. W. Baldwin, President. Herbert Fitzpatrick, John P. Murphy, Paul J. Bickel, Edw. J. White, Attorneys for Debtor, 13th & Olive Sts., St. Louis, Missouri.

UNITED STATES OF AMERICA,
Eastern Judicial District of Missouri,
City of St. Louis, Missouri, ss:

L. W. Baldwin, being duly sworn, deposes and says that he is an officer, to-wit, the President, of Missouri Pacific Railroad Company, a corporation, the petitioning Debtor mentioned and described in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes them to be true.

L. W. Baldwin.

Subscribed and sworn to before me this 31st day of March, 1933. Geo. W. Collins, Notary Public. My commission expires June 27, 1933. (Notarial Seal.)

Filed March 31st, 1933. Jas. J. O'Connor, Clerk.

[fol. 78] (Order No. 1)

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

No. 6935

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor.

Order.

Upon due consideration of the petition of Missouri Pacific Railroad Company, the above named Debtor, verified

March 31, 1933, and filed herein this day, stating that such Debtor is unable to meet its debts as they mature and that it desires to affect a plan of reorganization in accordance with Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and the Court being satisfied that such petition complies with said Section and has been filed in good faith, it is Ordered:

(1) That said petition be, and it hereby is, approved as properly filed under section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy.

(2) That the Debtor be, and it hereby is, authorized and directed, pending further order of this Court in the premises, to run, manage, maintain, operate and keep in proper condition and repair the railroads and property of the Debtor, wherever situated, whether in this state, judicial district, or elsewhere, and to manage and conduct its business as a railroad company, and to this end to exercise its authority and franchises and discharge all public duties obligatory upon it, and to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, to collect and receive the income, rents, revenues, tolls, issues and profits of said [fol. 79] property, to collect all outstanding accounts and all dividends and interest on securities belonging to it, to make such advances to its subsidiary corporations as are necessary to protect the Debtor's interest therein, in the same manner that it would be entitled and bound to do in its own right, and to the extent necessary to protect and preserve the property of the Debtor to make and pay for additions and betterments to the railroads and property of the Debtor, all according to law, and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein. The Debtor is authorized in its discretion from time to time until further order of this Court out of funds now or hereafter coming into its hands to pay:

(a) All taxes and assessments due or to become due upon the property of the Debtor.

(b) All necessary expenses of operating the railroads and conducting the business of the Debtor, including among other expenses the wages, salaries and compensation of all officers, attorneys, counsel, managers, superintendents,

agents or employees retained by the Debtor, ticket, traffic, car mileage and car per diem balances, interline accounts, freight and overcharge claims and amounts for car and equipment repairs as may become due to connecting or other railroad companies or other common carriers, including all sums now due or which may hereafter become due to other persons or corporations for the occupation or use, jointly or otherwise, of buildings, depots, terminals, tracks, side tracks, yards, warehouses, shops, bridges and other railroad facilities, and such sums as may be necessary to comply with the obligations of the Debtor under contracts by virtue of which said corporation or use may now or hereafter be enjoyed (but such payments shall not constitute affirmations of said contracts, or of any of them);

[fol. 80] (c) The following claims incurred by the Debtor within six months preceding the date of this order, to-wit: Wages, salaries, fees and other charges due and payable for services rendered to the Debtor in the usual and customary operation of its properties and the conduct of its current business, unpaid material and supply accounts incurred in the operation of said properties, unpaid and outstanding pay checks and wage checks representing labor actually performed for the Debtor, and unpaid ticket, traffic, car mileage and car per diem balances, interline accounts, freight and overcharge claims and amounts for car and equipment repairs incurred by the Debtor;

(d) The cost of maintaining the corporate existence of the Debtor, including the necessary expenses of the preservation of records, and the registration and transfer of its stocks and bonds and trustee's charges under indentures under which securities of the Debtor have been issued.

(3) The Debtor shall close its present books of account as of the close of business on March 31, 1933. The Debtor shall open new books of account as of the opening of business on April 1, 1933, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the Debtor, and shall preserve proper vouchers for all payments made on account thereof, and shall deposit the moneys coming into the hands in such of the banks in which funds of the Debtor are presently deposited as shall be selected by the Debtor, or in such other bank or banks as shall be selected by and approved by this Court.

(4) Within forty days after the entry of this order, the Debtor shall file with the Clerk of this Court a statement of the Assets and Liabilities of the Debtor as of the close of [fol. 81] business on March 31, 1933, and on or before the last business day of each calendar month thereafter shall file with said Clerk a statement of the Assets and Liabilities of the Debtor as of the close of business on the last day of the preceding month together with a summary statement of the revenues and expenses of the Debtor of the preceding calendar month. All such statements shall be certified as correct by the chief accounting officer of the Debtor.

(5) This Court reserves full right and jurisdiction to make from time to time such orders as the Court shall deem proper, appointing a trustee or trustees of all of said Debtor's property and estate, with all the title and powers of such trustee or trustees under and subject to the provisions of the Acts of Congress relating to bankruptcy, including the power to operate the business of said Debtor, fixing the time within which any plan of reorganization shall be proposed, accepted and confirmed, requiring the Debtor to file such schedule and submit such information as may be necessary to disclose the conduct of the Debtor's affairs and the fairness of any proposed plan, fixing a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced and allowed, and the division of creditors and stockholders into classes according to the nature of their respective claims and interests, and in general such orders amplifying, extending, limiting or otherwise modifying this order as to the Court may at any time seem proper.

C. B. Faris, District Judge.

Dated March 31, 1933.

Filed March 31st, 1933. Jas. J. O'Connor, Clerk.

[fol. 82] (Petition No. 11)

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

No. 6935.

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor.

In Proceedings for the Reorganization of a Railroad.

Petition of Missouri Pacific Railroad Corporation in Nebraska, et al.

To the Honorable the Judges of the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri:

The petition of: Missouri Pacific Railroad Corporation in Nebraska; The Beaumont, Sour Lake & Western Railway Company; The St. Louis, Brownsville and Mexico Railway Company; San Antonio, Uvalde & Gulf Railroad Company; and Houston North Shore Railway Company, Debtors, respectfully represents:

First. That Missouri Pacific Railroad Company, Debtor, a railroad corporation duly organized and existing under the laws of the State of Missouri, owns directly all of the capital stock, having power to vote for the election of directors of Missouri Pacific Railroad Corporation in Nebraska, Debtor, a railroad corporation duly organized and existing under the laws of the State of Delaware, and a common carrier by railroad engaged in the transportation of persons and property in interstate commerce in the State of Nebraska.

[fol. 83] Second. That Missouri Pacific Railroad Company, Debtor, owns approximately 94 per cent of the capital stock having power to vote for the election of directors of New Orleans, Texas and Mexico Railway Company, Debtor, a railroad corporation duly organized and existing under the laws of the State of Louisiana; and that said New Orleans, Texas and Mexico Railway Company, Debtor, owns directly all of the capital stock having power to vote for the election of directors of the following corporations,

with the result that Missouri Pacific Railroad Company, Debtor, owns indirectly, through an intervening medium, more than a majority of the capital stock having power to vote for the election of directors of said corporations, namely:

The Beaumont, Sour Lake and Western Railway Company, The St. Louis, Brownsville and Mexico Railway Company, San Antonio, Uvalde and Gulf Railroad and Houston North Shore Railway Company, Debtors, all of which are railroad corporations duly organized and existing under the laws of the State of Texas, and common carriers by railroad engaged in, or whose property is operated in, the transportation of persons and property in interstate commerce in the State of Texas.

Third. That heretofore on March 31, 1933, said Missouri Pacific Railroad Company, Debtor, filed in this Court in the above entitled proceeding, a petition stating that it is unable to meet its debts as they mature and that it desires to effect a plan of reorganization pursuant to Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy; that on March 31, 1933, this Court entered an order herein approving said petition as properly filed under said Section 77.

Fourth. That each of the Debtors joining in this petition is without sufficient funds to pay and discharge its obligations, and is unable to meet its debts as they mature; and [fol. 84] each desires to effect a plan of reorganization in connection with, or as a part of, the plan of reorganization of Missouri Pacific Railroad Company referred to in said petition of that Company, pursuant to Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy.

Fifth. That a copy of this petition will forthwith be filed with the Interstate Commerce Commission.

Sixth. That owing to the large number of creditors of the Debtors joining in this petition and the great amount of clerical and other labor required to make complete lists of creditors and other information required by clause (c) of Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, it is not practicable to prepare said lists within fifteen days and that for that reason the Debtors desire an extension of said time.

Seventh. That the filing of this petition by the Debtors joining herein was duly authorized by said Debtors by resolutions of their respective Boards of Directors or the respective Executive Committees of their Boards of Directors, thereunto duly authorized.

Wherefore, the Debtors hereinabove mentioned pray that an order may be entered herein approving this petition as properly filed by each of said Debtors under said Section 77 and that they may each be allowed to effect a plan of reorganization in connection therewith, or as a part of, the plan of reorganization of Missouri Pacific Railroad Company, referred to in said petition of said Debtor, that the time to prepare the lists of bondholders, creditors, and stockholders of the Debtors joining in this petition be extended to June 15, 1933, and that the Court will enter an appropriate order granting to all of the Debtors who are [fol. 85] parties to this proceeding such rights and powers as may be requisite for the carrying on of their business and the preservation of their properties, and that all of the Debtors be granted all other and further relief to which they may be entitled.

Missouri Pacific Railroad Corporation in Nebraska, The Beaumont, Sour Lake & Western Railway Company, The St. Louis, Brownsville & Mexico Railway Company, San Antonio, Uvalde and Gulf Railroad Company, Houston North Shore Railway Company, L. W. Baldwin, President. Paul J. Bickel, Thos. T. Railey, Edw. J. White, Attorneys for said Debtors, 13th and Olive Streets, St. Louis, Missouri.

UNITED STATES OF AMERICA,
Eastern Judicial District of Missouri,
City of St. Louis, Missouri, ss.

L. W. Baldwin, being duly sworn, deposes and says that he is an officer, to wit, the President of Missouri Pacific Railroad Corporation in Nebraska, The Beaumont, Sour Lake & Western Railway Company, The St. Louis, Browns- [fol. 86] ville and Mexico Railway Company, San Antonio, Uvalde & Gulf Railroad Company and Houston North Shore Railway Company, corporations, petitioning Debtors mentioned and described in the foregoing petition; that he has read the foregoing petition and knows the contents thereof,

and facts stated therein with respect to said corporations are true.

L. W. Baldwin.

Subscribed and sworn to before me this 1st day of May, 1933. Geo. W. Collins, Notary Public. My commission expires June 27th, 1933. (Seal.)

Filed May 2, 1933. Jas. J. O'Connor, Clerk.

(Order No. 11)

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

No. 6935

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

In Proceedings for the Reorganization of a Railroad

Order

On Petition of Missouri Pacific Railroad Corporation in Nebraska, et al.

Upon due consideration of the petition of: Missouri Pacific Railroad Corporation in Nebraska; The Beaumont, [fol. 87] Sour Lake & Western Railway Company; St. Louis, Brownsville and Mexico Railway Company; San Antonio, Uvalde & Gulf Railroad Company, and Houston North Shore Railway Company, Debtors, verified May 1, 1933, and filed herein under Section 77 of Chapter VIII of Acts of Congress relating to bankruptcy, showing that more than a majority of the capital stock of the Debtors joining in said petition is owned by Missouri Pacific Railroad Company, Debtor, either directly or indirectly through an intervening medium, and showing further that the Debtors joining in said petition are unable to meet their debts as they mature, and that they desire to effect a plan of reorganization in connection with, or as a part of, the plan of reorganization of Missouri Pacific Railroad Company, Debtor, pursuant to said Section 77, and the Court being satisfied that said petition complies with said Section 77 and has been filed in good faith, it is Ordered:

(1) That said petition of Missouri Railroad Corporation in Nebraska et al., Debtors, be, and it is hereby approved,

as to each and all of the Debtors joining therein, as properly filed under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and in this proceeding in which the petition of Missouri Pacific Railroad Company has been filed.

(2) That the order heretofore entered herein on March 31, 1933, with respect to operating of railroads and other property of Missouri Pacific Railroad Company, payments of taxes, expenses, six months claims, and other items, and the exercise of other powers and privileges as therein set forth, and the orders entered herein on April 7, 1933, with respect to payments to pensioned employes and settle-[fol. 88] ment of prior interline and certain other accounts and the order entered herein on April 15, 1933, with respect to honoring of outstanding pay checks, are hereby extended to and made applicable to all the Debtors parties hereto.

(3) That the Debtors joining in the petition, hereby approved, of Missouri Pacific Railroad Corporation in Nebraska et al., shall close their present books of accounts as of the close of business on April 30, 1933, and shall open new books of account as of the opening of business on the following day, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts, and disbursements of the Debtors, and shall preserve proper vouchers for all payments made on account thereof, and shall deposit the moneys coming into their hands in such of the banks in which funds of the Debtors are presently deposited as shall be selected by the respective Debtors, or in such other bank or banks as shall be selected by them and approved by this Court.

(4) That within forty days after the entry of this order, the Debtors joining in said petition shall file with the Clerk of this Court a statement of their assets and liabilities as of the close of business on April 30, 1936, and on or before the last business day of each calendar month thereafter shall file with said Clerk a statement of their assets and liabilities as of the close of business on the last day of the preceding month together with a summary statement of their revenues and expenses of such calendar month. Such statements may be made on a consolidated basis as to any Debtors all of whose capital stock is owned by any other Debtor. All such statements shall be certified as correct by the chief accounting officer of the respective Debtors.

[fol. 89] (5) That for cause shown, the time within which the Debtors joining in said petition shall prepare the lists of their bondholders, creditors, and stockholders, and other information required by clause (c) of Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy is hereby extended to June 15, 1933.

(6) That this Court reserves full right and jurisdiction to make from time to time such orders as the Court shall deem proper, appointing a trustee or trustees of the Debtors' property and estate, with all the title and powers of such trustee or trustees under and subject to the provisions of the Acts of Congress relating to bankruptcy, including the power to operate the business of the Debtors, fixing the time within which any plan of reorganization shall be proposed, accepted, and confirmed, requiring the Debtors to file such schedules and submit such information as may be necessary to disclose the conduct of the Debtors' affairs and the fairness of any proposed plan, fixing a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced and allowed and the division of creditors and stockholders into classes according to the nature of their respective claims and interests, and in general such orders amplifying, extending, limiting, or otherwise modifying this order as to the Court may at any time seem proper.

C. B. Faris, District Judge.

Dated May 2d, 1933.

Filed May 2, 1933. Jas. J. O'Connor, Clerk.

[fol. 90] (Order No. 57)

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

No. 6935

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

In Proceedings for the Reorganization of a Railroad

Order Confirming Appointment, Entered June 22, 1923, Temporarily Appointing Trustees

On March 31, 1933, the Missouri Pacific Railroad Company, Debtor, filed its petition herein, stating that Debtor

was unable to meet its obligations as they matured and would mature and that it desired to effect a plan of reorganization in accordance with the provisions of Section 77 of Chapter VIII of the Act of Congress relating to bankruptcy.

The Court, being satisfied that said petition complied with said section of the Act and that it was filed in good faith, thereupon, on March 31, 1933, approved said petition as properly filed, under said section of the Act, and entered an order, authorizing the Debtor, pending further order of this Court in the premises, to operate and maintain the railroads and property of the Debtor, wherever situated, and to manage and conduct its business, and to exercise subject to such supervision and control by the Court as the Court might exercise by further orders entered herein.

Subsequent to said date, petitions having been filed by various subsidiaries of said Missouri Pacific Railroad Com-
[fol. 91] pany, Debtor, in this cause, and the Court, having fully considered said petitions, approved the same as properly filed under said section of the Act and entered orders authorizing *as*id Debtors, pending the further order of this Court, in the premises, to continue to operate and maintain the railroads and property of said Debtors, wherever situated, and to manage and control the business of said Debtors and to exercise the different, sundry powers, according to law, specified in said orders, subject to the supervision and control of this Court as the Court might exercise by further orders entered herein.

On June 22, 1933, pursuant to the provisions of Section 77 of said Act, this Court entered an order, temporarily appointing L. W. Baldwin and Guy A. Thompson, both of St. Louis, Missouri, as temporary Trustees for the railroads and property of, all and sing-lar, the railroads, lands, properties, estates, rights and franchises, of whatever character and wherever situated, of all of said Debtors, said Trustees having been selected from a panel of standing trustees, designated and qualified for service as such, pursuant to subdivision (c) of Section 77 of Chapter VIII of the Act of Congress relating to bankruptcy, said order, appointing Trustees, to be effective as of the beginning of business on July 1, 1933, and said order specifying that such appointment should apply to the estates of all Debtors hereafter becoming parties to this proceeding from and

after the respective dates of approval of the petitions of such subsequent Debtors.

And said order, temporarily appointing said Trustees, having provided that notice should be published once a week for two, consecutive weeks in one, daily newspaper of general circulation in each of the Cities of St. Louis, and [fol. 92] Kansas City, Missouri; Houston, Texas; Omaha, Nebraska; Little Rock, Arkansas; New Orleans, Louisiana, and New York, New York, notifying all persons, firms and corporations having in their possession any of the property of the Debtors to deliver the same to the Trustees, and notifying the creditors and stockholders of said Debtors that, on the 25th day of July, 1933, at eleven o'clock in the Forenoon, Central Standard Time, the undersigned Judge, in the Court Room of the United States District Court at the Federal Building in St. Paul, Minnesota, would determine whether such appointment of such Trustees should be made permanent or should be terminated or a substitute Trustee or Trustee should be appointed by the Court, and, it appearing to the Court that, within ten days from and after July 1, 1933, each of said Trustees executed and filed with the Clerk of the United States District Court for the Eastern Division, Eastern Judicial District Missouri, a bond, with solvent sureties, in the sum of fifty thousand ($50,000.00), each, conditioned, as required in said order temporarily appointing said Trustees, entered June 22, 1933, and it further appearing to the Court that said Debtors have filed with the Court their report of compliance with said order, and that all known creditors and stockholders of the Debtors have been notified of this hearing, in accordance with the provisions of Section 77 of Chapter VIII of said Act, and this hearing being now held in accordance with said notice and the provisions of said Act, and certain creditors and stockholders of the Debtors having appeared by Counsel at this hearing, and the Court, having heard the arguments of said Counsel, and being duly advised in the premises and being of the opinion that the interests of all parties will be best conserved by affirming, until the further order of this Court, the order entered by the Court herein on June 22, 1933, temporarily appoint- [fol. 93] ing said L. W. Baldwin and Guy A. Thompson, Trustees of the railroads and properties of said Debtors; it is, therefore,

Ordered, Adjudged and Decreed that said order temporarily appointing said L. W. Baldwin and Guy A. Thompson, Trustees for the railroads and properties of said Debtors, entered June 22, 1933, Be, and the Same Is Hereby, Confirmed and Approved, and said appointment of said Trustees is hereby made permanent, and the said L. W. Baldwin and Guy A. Thompson are hereby appointed permanent Trustees of, all and singular, the railroads, lands, properties, estates, rights and franchises, of whatever character and wherever situated, of the

Missouri Pacific Railroad Company,
New Orleans, Texas & Mexico Railway Company,
International-Great Northern Railroad Company,
Missouri Pacific Railroad Corporation in Nebraska,
The Beaumont, Sour Lake & Western Railway Company,
The St. Louis, Brownsville and Mexico Railway Company,
San Antonio, Uvalde & Gulf Railroad Company,
Houston North Shore Railway Company and
Missouri-Illinois Railroad Company,

and such appointments shall also apply to the estates of all Debtors hereafter becoming parties to this proceeding from and after the respective dates of the approval of the petitions of such subsequent Debtors.

And said Trustees shall have all the title and be subject to the control of the Court and, consistently with the provisions of Section 77 of Chapter VIII of the Act of Congress relating to bankruptcy, shall exercise all of the powers of trustees appointed pursuant to Section 44 or any other section of the Act of Congress relating to bankruptcy.

[fol. 94] Such Trustees shall have all of the powers, rights and privileges heretofore granted to or conferred upon them while temporary Trustees, and all of the rights, powers and privileges heretofore granted to or conferred upon the respective Debtors, or any of them, pursuant to any or all of the orders heretofore entered by this Court in this proceeding, and each and all of the orders entered in this proceeding shall, with respect to the Trustees and the properties in their possession be of like force and effect as though said Trustees were therein specifically named, instead of said respective Debtors, all of said orders being herein incorporated in and made a part of this order by reference.

And all persons, firms and corporations having in their possession any of the property of the Debtors or any of

the property of the Debtors subsequently becoming parties to this proceeding are hereby ordered to deliver the same to said Trustees and to make such transfers, assignments and conveyances in connection therewith as may be necessary and proper; and each and every — of the officers, directors, agents and employes of the Debtors are hereby required to turn over and deliver to said Trustees, or their duly constituted representatives or agents, any and all books of accounts, vouchers, papers, deeds, contracts, notes, securities, accounts, moneys or other property in his or their hands, or under his or their control, belonging to or in the possession of any of said Debtors; and to abide by and conform to such orders as may be given from time to time by said Trustees, or their duly constituted representatives, in conducting the operations of the Debtors, and in the discharge of their duties as such Trustees.

And such Trustees are hereby authorized and directed to run, manage, maintain and, operate the railroads and [fol. 95] properties of the Debtors, wherever situated, and to manage and conduct the business of each of said respective Debtors, and to exercise such sundry other powers according to law and subject to the supervision and control of the Court as the Court may exercise by other orders entered herein, all as set forth in the order of this Court temporarily appointing said Trustees, entered June 22, 1933, and in the supplemental order appointing Trustees, entered June 30, 1933, and in the order granting Trustees authority to employ Attorneys, entered July 1, 1933.

And the Court reserves full right and jurisdiction to make, from time to time, such other and further orders as the Court shall deem proper, amplifying, extending, limiting or otherwise modifying such orders of June 22, 1933, temporarily appointing said Trustees, and said orders of June 30, 1933, and July 1, 1933, and, in all respects, to regulate and control the conduct of said Trustees.

C. B. Faris, U. S. District Judge.

Dated St. Paul, Minn., July 25, 1933.

Received and filed Jul. 26, 1933. Jas. J. O'Connor, Clerk.

(Order No. 416)

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

No. 6935

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

In Proceedings for the Reorganization of a Railroad

[fol. 96] **Order**

Accepting Resignation of L. W. Baldwin as Co-Trustee, and Continuing Guy A. Thompson as Sole Trustee

L. W. Baldwin having this date tendered his resignation as Co-Trustee of the debtor companies parties to this proceeding; and the Court being fully advised in the premises, It Is Ordered:

That the resignation of said L. W. Baldwin as Co-Trustee of the debtor companies involved in these reorganization proceedings, be and the same is hereby accepted, effective at twelve o'clock noon of this date.

That effective at twelve o'clock noon of this date, Guy A. Thompson, the now duly appointed, qualified, and acting Co-Trustee of the debtors herein, shall continue as sole Trustee; that all orders in this proceeding now affecting the Trustees of said Debtors shall continue with like effect with respect to said Guy A. Thompson as continuing sole Trustee; that said Guy A. Thompson, in his capacity as sole Trustee, shall succeed to all rights and liabilities of said L. W. Baldwin and Guy A. Thompson as Trustees of the several debtor companies, and may sue or be sued in his capacity as sole Trustee on any cause of action that could heretofore have been prosecuted against or in behalf of said Co-Trustees of the respective debtors.

That the bond of Guy A. Thompson, Trustee, in the amount heretofore approved, shall be corrected in conformity with this order, and when so corrected, shall be accepted by the Clerk of this Court.

[fol. 97] That this Court reserves the right to rescind,

modify, amplify, or in any manner change the terms of this order as may hereafter to the Court seem proper.

Dated this 26th day of December, 1935.

C. B. Faris, United States Circuit Judge for the Eighth Circuit, sitting as District Judge for the Eastern Division, Eastern Judicial District of Missouri.

Filed Dec. 26, 1935. Jas. J. O'Connor, Clerk.

(Petition No. 709)

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

No. 6935

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

In Proceedings for the Reorganization of a Railroad

Petition

Of Brownsville Navigation District of Cameron County, Texas, for Leave to Mandamus the St. Louis, Brownsville and Mexico Railway Company in the Federal Court, Southern District of Texas, Houston, Texas, Requiring Said Carrier to Furnish Equipment to Transport Interstate Commerce to and from the Port of Brownsville, Texas.

To the Honorable Judge of the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri:

Comes now the Brownsville Navigation District of Cameron County, Texas; F. A. Lallier, operating under the trade name of Lallier and Company; J. G. Philen, Jr., [fol. 98] operating under the name of J. G. Philen, Jr. Company, and under the name of Philen, Miller and Company, all of Brownsville, and present to the Court that:

I

Heretofore, under date of November 17, 1933, the St. Louis, Brownsville and Mexico Railway Company filed with

this Court a motion to stay proceedings against Debtor, being more particularly described as Motion 116 in Proceedings for the Reorganization of a Railroad, No. 6935. That under date of November 17, 1933, this Court issued the following order staying pending suits against Debtor until after final decree:

"Order Staying Pending Suits Against Debtors Until After Final Appeal.

"Upon reading the motion of Trustees, asking that a stay order be entered in this cause, staying the further prosecution of all suits (other than claims for injuries to or death of employes) against the Debtors until after final decree in this cause, and, upon further consideration of General Order No. 19, entered in this cause:

"It is Ordered and Decreed that Paragraph 4 of General Order No. 19, which authorizes the further prosecution of suits pending in any Court or tribunal of competent jurisdiction, and the liquidation of all claims, by reducing same to judgment in such jurisdiction where the same are pending, shall be, and the same is hereby, modified to the following extent:

"From and after the entry of this order, all suits (other than claims for injuries to or death of employes), wherever pending, against any of the Debtors, shall be stayed until after final decree in this cause, and the continued prosecu-
[fol. 99] tion of any and all suits (other than claims for injuries to or death of employes) which have for their object the enforcement of any lien or judgment against the property of the Debtors in the hands of the Trustees shall be, and the same is, hereby, enjoined until after final decree entered in this cause.

C. B. Faris, United States District Judge.

Dated Nov. 14, 1933.

Filed Nov. 17, 1933. Jas. J. O'Connor, Clerk."

That under date of December 2, 1935, this Honorable Court amended said order in the following particulars:

"Amended Order Staying Certain Pending Suits Against Debtors Until After Final Decree.

"Whereas, subdivision (j) of Section 77 of the Act relating to Bankruptcy, as amended August 27, 1935, has made

necessary certain changes in orders respecting the staying of suits against the debtors, Now It Is Ordered:

"That Order No. 116, heretofore entered in these proceedings on November 14, 1933, is hereby repealed.

"That commencement or continuation of suits against any of the debtor companies is hereby stayed and enjoined until after final decree entered in these proceedings, provided, however, that suits or claims for damages caused by the operation of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any Court of competent jurisdiction, and any order heretofore staying [fol. 100] the prosecution of any such causes of action or appeal is hereby vacated.

C. B. Faris, United States Circuit Judge for the Eighth Judicial Circuit sitting as District Judge for the Eastern Division, Eastern Judicial District of Missouri.

Filed Dec. 2, 1935. Jas. J. O'Connor, Clerk."

The Court's attention is directed to the fact that the amended order stays "commencement or continuation of suits against any of the debtors" and that such stay as contained in order 116-A above copied is not limited to suits which would result after judgment in a lien on the property of the debtor.

II

Petitioners herein seek to prosecute in the District Court of the United States for the Southern District of Texas, Houston Division, a suit which involves a matter arising under the Interstate Commerce Act dealing with the duty of a carrier to transport interstate commerce as defined by that Act in connection with which the debtor is furnishing equipment for the movement of the commodities in question through certain ports and certain gateways. Said debtor is at the same time refusing to furnish like equipment for the transportation of the same identical interstate commerce through the port or gateway of Brownsville and is thus, by said acts, violating the provisions of the Interstate Commerce Act in that a discrimination and preference is shown for one gateway as compared with another. Petitioners seek to have debtor The St. Louis, Brownsville and Mexico [fol. 101] Railway Company required to furnish to the Port of Brownsville and to the shippers of commerce through

that port the same quantity and the same character of equipment that debtor is furnishing for the transportation of the commodities involved through other ports and other gateways. The particulars with respect to the matter are fully set out in the petition which has heretofore been filed in the District Court of the United States for the Southern District of Texas, Houston Division. That petition is attached hereto and made a part hereof as though fully copied herein.

III

Petitioners herein respectfully show to this Honorable Court that the relief prayed for in the Federal District Court of Texas will not in any way interfere with jurisdiction of this Court over the property of the debtor and the relief prayed for will not in any way affect the final settlement which may be approved by this Court as between debtor and its creditors.

IV

Petitioners respectfully show to this Honorable Court that the District Court of the United States for the Southern District of Texas is the only United States District Court that has jurisdiction of all the parties under Section 51 of the Judicial Code, 28 U. S. C. A., Section 112, to enforce the provisions of Section 49, Title 49, U. S. C. A., being the Interstate Commerce Act.

V

Petitioners further respectfully show to this Honorable Court that witnesses cognizant of the facts asserted by petitioners and known to the Debtor reside in the Southern Dis-
[fol. 102] trict of Texas and will be available only if the suit is prosecuted there.

Wherefore, petitioners pray for an order to be entered in this cause granting them permission to proceed with the trial and final disposition of the matter now pending in the District Court of the Southern District of Texas, Houston Division, No. 952 at Law.

Respectfully submitted, Brownsville Navigation District of Cameron County, Texas, F. A. Lallier, J. G. Philen, Jr., by Rentfro & Cole, of Brownsville, Texas, Attorneys for Petitioners. A. L. Reed, of Callaway & Reed, Dallas, Texas, Of Counsel.

(Exhibit filed but not printed.)

Filed Dec. 17, 1936. Jas. J. O'Connor, Clerk.

Exhibit Respondent's No. 1—Order dated Jan. 20, 1937, Authorizing Suit in the Southern District of Texas against Guy A. Thompson, Trustee, for the St. Louis, Brownsville and Mexico Ry., Co., in case entitled "in the matter of Missouri Pacific Railroad Company", U. S. District Court, Eastern District of Missouri, omitted from the printed record, being heretofore copied at page 34.

* * * * * * *

[fol. 103] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION

No. 952. At Law

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS et al., Relators,

v.

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, GUY A. THOMPSON, Trustee, et al., Respondents

AFFIDAVIT OF F. S. SCHWINN

THE STATE OF TEXAS,
County of Harris:

F. S. Schwinn, being duly sworn, deposes and says upon his oath:

My name is F. S. Schwinn. I am and for many years have been Assistant Chief Engineer of the St. Louis, Brownsville & Mexico Railway, and of its Trustee, Mr. Guy A. Thompson.

The map hereto attached and hereby referred to and made a part hereof was prepared in my office. It delineates in simple form the substance of the railroad situation in and around Brownsville, Texas, with particular reference to the tracks serving the Port of Brownsville; the main lines of railroad entering Brownsville; the inter-railroad connections at and near Brownsville, and the route from Brownsville

across the Rio Grande to Matamoros, State of Tamaulipas, Republic of Mexico. The red lines on the map show the principal tracks of the St. Louis, Brownsville & Mexico Railway; the yellow lines show the principal tracks of the Texas and New Orleans—one of the Southern Pacific Lines; the green indicates the property of the Brownsville & Matamoros Bridge Company, including the bridge and approaches, and the blue line shows the track of the Port Isabel & Rio [fol. 104] Grande Valley Railway. The map also shows some joint track used both by my line and the Port Isabel road.

The distances in miles between the principal points shown on the attached map are as follows:

From center of the tracks serving the Turning Basin to connection between Navigation District tracks and Port Isabel Railway tracks—1.2;

From junction of Navigation District tracks and Port Isabel tracks to St. L. B. & M.-P. I. & R. G. V. interchange—6.2;

Port Isabel—St. L. B. & M. interchange to St. L. B. & M.-B. & M. Bridge interchange—2.49;

From St. L. B. & M.-B. & M. Bridge interchange to international boundary, on bridge—0.776; to Matamoros yards, an additional 0.464 miles; a total of 1.24 miles.

In moving a car from the Port of Brownsville to Matamoros, the distances moved are, therefore, as follows:

Port Isabel & Rio Grande Valley, 7.4 miles. This line operates not only over its own tracks, but also over those of the Navigation District.

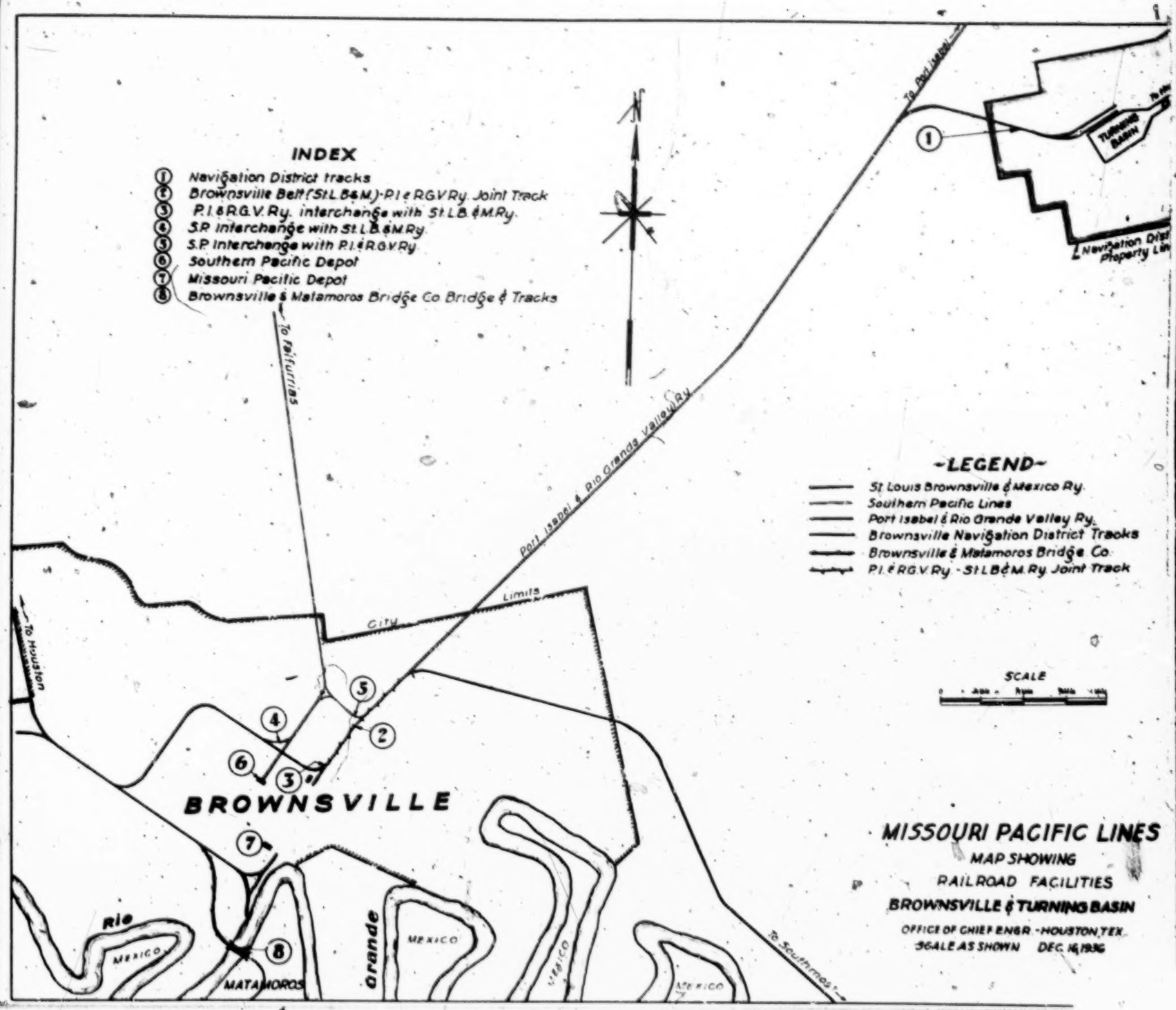
St. L. B. & M., 2.49 miles.

B. & M. Bridge, 1.24 miles.

(Signed) F. S. Schwinn.

Sworn To And Subscribed before me by F. S. Schwinn this 19th day of February, A. D. 1937. (Signed) Virginia Ratliff, Notary Public in and for Harris County, Texas. (Seal.)

(Here follows 1 map, side folio 105.)



[fol. 106] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION

No. 952. At Law

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, et al., Relators,

v.

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, GUY A. THOMPSON, Trustee, et al., Respondents

AFFIDAVIT OF T. H. LEVY—February 17, 1937

THE STATE OF TEXAS,
County of Harris:

T. H. Levy, being duly sworn, deposes and says upon his oath:

My name is T. H. Levy. I am General Superintendent of Transportation for the defendant, Guy A. Thompson, Trustee of The St. Louis, Brownsville & Mexico Railway Company, Debtor, and have been for a number of years. I am also General Superintendent of Transportation for certain other railroads in Texas commonly known as the Missouri Pacific Lines, including the International-Great Northern, the San Antonio, Uvalde & Gulf and the so-called Gulf Coast Lines, consisting of a number of railroads operated under a common management and extending from Brownsville, Texas to New Orleans, Louisiana. In my official capacity, I am and for a number of years have been in charge of the car supply on the railroads mentioned above, which aggregate about 3,000 miles of railroad. In addition to the Missouri Pacific Lines under my jurisdiction in Texas and Louisiana, the Missouri Pacific system lines include 8,000 or 9,000 other miles of railroad, all of which are shown on the attached map, marked "Exhibit 1" and hereby referred to and made a part hereof.

[fol. 107] The matter of supplying cars to satisfy the needs of shippers at different times and places is one in which consideration must be given to a great number and complexity of factors. There are, for instance, different types of equipment which are essentially fitted for the movement of certain kinds of traffic. There are flat cars which are used for the movement of heavy machinery too

large for loading in box cars, iron and steel pipe of considerable length, piling, large timbers and other heavy freight which the flat car will serve to move better than any other type of equipment. Then, there are gondola cars which are nothing but flat cars with low sides, and these are used for the movement of such commodities as gravel, [illegible] coal, scrap iron and many other commodities which do not require protection from the atmosphere, such as is given by a box car, but on the other hand, need sides to prevent them from being lost off the car in transit. These gondola cars themselves are of different types, the chief distinction being between the ordinary gondola, which is a simple flat car with low siding, and the hopper bottomed gondolas, which can be unloaded by releasing the catches on hoppers which constitute the bottoms of such cars. Hopper bottomed cars are expensive to build and are usually employed for the movement of special commodities such as coal and sulphur. They are at times used in distributing ballast. There are also box cars, which are completely enclosed with sides, roof and doors, and these are of several types and sizes, including cars especially fitted with equipment for the handling of automobiles. There are also refrigerator cars which are intended for the transportation of perishable products such as fresh meats, fruits, vegetables, etc. There are also stock cars which have roofs and slatted sides and are primarily intended for the movement of livestock, but are sometimes used for other commodities such as watermelons and irish potatoes. Stock [fol. 108] cars at times are subdivided into types such as double-deckers for the movement of small animals like sheep and swine.

The lines of which I am an officer, including the defendant mentioned above, produce a large volume of commodities which are seasonal in nature. On the lines of the St. Louis, Brownsville & Mexico, the San Antonio, Uvalde & Gulf and the International-Great Northern, fresh vegetables and citrus fruits are produced in great quantities, beginning in the early winter and extending until late in the spring. Among the commodities so produced are oranges, grapefruit, cabbage, spinach, beets, carrots, beans, lettuce, Irish potatoes, tomatoes and a number of other crops. Most of these commodities just mentioned move in refrigerator cars, although some of them move under ven-

tilation rather than refrigeration. Refrigerator cars must be assembled in large numbers at or near the point of production of such crops before they begin to move out and in most instances the haul of the car to the point of loading is an empty haul, not only in the beginning of the season but during the season. In other words, after the car is unloaded at destination, it rarely gets a load back to the place where it must be used for reloading with perishables. When the season is over for the movement of such crops on the lines under my jurisdiction, these refrigerator cars are usually moved to other sections of the country, such as California, Colorado, Utah, Idaho, etc., for the transportation of other crops requiring the use of such equipment, and of course, the owners of the equipment make an effort in this way to find employment for the equipment during the greater part of each year.

Of course, these producing seasons do not begin on exactly the same day each year and the producing season in one section of the country frequently overlaps the producing season in other sections. In order to approximate the number of such cars which will be needed in any par- [fol. 109] ticular section of the country to move an on-coming crop, it is necessary for my department to cause elaborate surveys and inspections to be made in advance by men who are capable of judging the probable output in terms of carloads in the various producing sections. By such means we are able to estimate in advance something like the number of cars that will be required for the handling of a crop which has not yet begun to move. These estimates, however, must constantly be corrected, due to the occurrence of matters which cannot be foreseen or properly appraised in advance. For instance, a severe freeze may substantially curtail the estimated quantity of fresh vegetables or citrus fruits to be produced in a given area. Likewise, especially favorable weather may cause a very much larger crop to be produced than might normally be anticipated from a given acreage.

Radical changes in market prices may also very materially affect the movement of commodities. If the market price goes exceedingly high, the farmers will harvest and move everything in sight as quickly as possible in order that they may take advantage of the high price while it endures. But if the prices goes exceedingly low, the farmers

will leave immense quantities of produce in the fields in the belief that it would not pay to harvest and ship it.

Refrigerator cars are usually owned by corporations known as "private car lines" and these, in turn, are usually owned or controlled by one or more railroad systems. Railroads which use refrigerator equipment generally acquire the use of such cars under special contracts and these contracts generally provide for the reimbursement of the owner at a rate per mile for the mileage over which the car moves. On the other hand, most other equipment, such as box cars, flats and gondolas, move from one line to another under a general agreement to which most railroads are parties, and by virtue of which the user pays to the owner a per diem or rental charge which, at the present time, is [fol. 110] a dollar per day per car. Thus, the officer in charge of car supply has constantly pressing upon him for solution not only the problem of seeing that his patrons are furnished with cars at producing points when needed but also the problem of holding down, as low as possible, the mileage charges paid to private car lines and the per diem charges paid to other railroads for the use of their equipment. And obviously the problem with respect to cars paid for on a mileage basis differs from that with respect to cars on per diem, because in one instance time is of no importance and mileage is the controlling factor, and in the other case the reverse is true.

Other types of equipment are also used to handle commodities which in some cases move with a fair degree of regularity; in other cases, move seasonally, and still in other instances move rather spasmodically.

The movement of sugar cane in Louisiana is a very heavy seasonal movement, usually handled in gondola cars. At times this movement is so heavy that it severely taxes the ability of the carriers to furnish the necessary equipment, as the cane cannot be moved until it is ripe and must then be moved with the utmost dispatch to avoid loss of sugar content and hazard of freezing and spoilage from other causes.

Cotton is also a seasonal crop, which is usually handled in box cars when moved by rail. So is grain. On the other hand, canned goods, textiles, sugar, flour, building materials, furniture and the like are things which move with a fair degree of regularity throughout the year. Again,

there are commodities which move in very heavy volume but rather spasmodically or intermittently. For instance, when a new oil field is brought in, there will, for a time, be a very heavy movement of pipe, drilling machinery and the like inbound, and crude oil outbound. When the field is connected to pipe lines, the crude oil movement falls off [fol. 111] to practically nothing, but in some degree may be replaced by an outbound movement of refined oils, and, of course, the inbound movement of pipe, drilling rigs, etc., diminishes very materially. Likewise, when large construction projects are under way, such as great road building programs, there will, for a time, be heavy movements of sand, gravel, cement, stone, steel and other construction materials and machinery, and the equipment to provide for all of these movements must be arranged for in advance, and all of these movements must be interlaced together, and, in order to provide an economical operation, the empty car mileage must constantly be kept at the lowest possible point.

There is also the added complication that a great many of these commodities move over more than one line of railroad. For instance, the automobiles which we deliver in Texas and Louisiana are produced in large quantities in Michigan and other States. The vegetables and fruits which we grow in Texas are consumed in very large volume north of the Ohio and east of the Mississippi, especially in places like Chicago, New York, Boston and Philadelphia, as well as points in Canada. This makes it necessary for the railroads to co-operate with one another, especially in this business of car supply, and for many years there has been the same co-operation between American railroads and Canadian railroads as among the American railroads themselves. In other words, the Canadian railroads are parties to the same agreements, and, so far as car supply is concerned, there is no international boundary between this country and Canada.

Substantially the same situation used to exist many years ago with respect to the Mexican railroads, but for a number of years now the Mexican lines, particularly the National Railways of Mexico, have refused to permit any of their equipment to leave the Republic of Mexico. Members of the traveling public will recall that years ago in this [fol. 112] section of the country it was quite common to

see freight cars stenciled with the name of the National Railways of Mexico, or the initials "N. de M.", but those same people will recall that in the past five or ten years they have not seen such cars on American railroads or in railroad yards. Consequently, there has not been and cannot be the same kind of co-operation in the matter of car supply with respect to the international traffic between Mexico and the United States as there is with respect to the international traffic between the United States and Canada. It is true that some American equipment goes into Mexico but the Mexican equipment is not permitted to come into this country, and in order to avoid car shortage in this country, the American lines must necessarily be extremely careful about the amount of their equipment which they permit to enter Mexico and at what times and upon what conditions. Otherwise, the important patrons of the railroads owning such equipment might well be short of equipment sorely needed for immediate loading of commodities produced on the line of the owner while that owner's equipment was off in some foreign country serving people in whom the owning line has no direct interest whatever.

The car supply officer is faced with one other difficulty which arises out of the fact that his railroad is frequently in competition with other railroads serving the same territories and often the same points. If commodities are moving out of any locality in volume and one railroad has plenty of equipment and its competitor has none, the traffic will obviously move over the line which is able to furnish equipment for the loading.

In view of many of the factors and circumstances which I have mentioned above, it is quite obvious that the car supply officer is frequently required to change or modify his plans on very short notice; to receive his information and give his instructions by telegraph or telephone and to [fol. 113] shape his plan or campaign not only from month to month, but from day to day and from hour to hour and from minute to minute.

Any Court or commission or board or other governmental agency which undertakes to have any part in the regulation or control of the supply of cars on the defendant railroads, or either of them, or on any other American railroad, must, if the job is to be intelligently done, take into consideration the same facts and circumstances that

the individual car supply officer would take into consideration in handling such matters for his own railroad, and must also take into consideration the needs of connecting and competing lines and their patrons, and must also be in position to act promptly in meeting unforseen conditions and difficulties, and the entire plan must be kept in more or less fluid or plastic form in order that it may be modified on an instant's notice to meet some circumstance which has suddenly arisen or of which the car supply officer has suddenly been notified. For this reason, if any part of the plan is solidified, or any particular quantity of equipment is definitely assigned to a particular service or a particular locality, conditions may arise which will cause some hardship and possibly great loss to shippers or carriers, or both, unless that assignment can be promptly changed or released.

The furnishing of cars at proper times and places must also be arranged for in the light of agreements made between carriers for a co-operative interchange of cars; the rates charged for the service rendered to the patron, which includes not only the rate for the actual movement of the commodity but also incidental services or concessions such as free time before loading and after delivery at destination for unloading, and also the expense incident to the accumulation and supply of such cars. Freight equipment generally is interchanged between American railroads under a co-operative agreement generally known as the Code [fol. 114] of Car Service and Per Diem Rules, but the defendant, Port Isabel & Rio Grande Valley Railroad Company, is not a party to this Code of Rules and is, therefore, not entitled to the free interchange of equipment between itself and the Trustee of the St. Louis, Brownsville & Mexico in the same way that other connecting lines are, such as the Southern Pacific and Santa Fe; however, there is an arrangement under which there is a limited interchange of equipment between the two defendant railroads.

Generally speaking, our equipment, or foreign line equipment in our possession, is delivered to the Port Isabel Railroad only when loaded with freight consigned to some destination on the rails of the Port Isabel Railroad, or when requested by the Port Isabel road for loading on its rails with freight to be shipped out over the line of the St. Louis Brownsville & Mexico. I understand that the Port Isabel

Railroad also has a similar limited interchange arrangement with the Texas and New Orleans Railroad Company, one of the Southern Pacific Lines, at Brownsville. I also understand that the equipment owned by the Port Isabel Railroad is negligible in quantity.

It has been asserted that we have refused to furnish equipment (a) for loading at the Port of Brownsville with traffic to be moved to or through Matamoros, and (b) for loading at Matamoros or other Mexican points with freight to be transported by rail to the Port of Brownsville and thence by vessel. It is also asserted that at the same time we have freely furnished equipment for transportation between the United States and Mexico through the Laredo gateway. These charges or assertions are based upon a misapprehension not only of our policies but also of the facts. For the past several years, our lines, and as far as I know, other American lines, except in times of acute car shortage, have furnished equipment for loading on their own lines with freight consigned to points in Mexico, the [fol. 115] sole condition being that the line furnishing the car receives a line haul movement of the freight and consequently a division of the line haul revenues. I have caused a careful check to be made of the car records kept in my office and they do not show a single instance, and apart from the records I have no recollection whatever of any single instance, of a car being furnished at Laredo for the movement of traffic into Mexico under conditions comparable to those existing at Brownsville, namely, where the line furnishing the car would get nothing more than a switching charge on the freight with which the car was loaded.

Except as just mentioned, namely, in connection with a loaded line haul movement, the Trustee of the St. Louis Brownsville & Mexico Railway has not published, promulgated or acted upon any rule or regulation, or engaged in any practice, or maintained any policy with respect to the furnishing of equipment for the movement of traffic between the Port of Brownsville and points in Mexico or other like traffic using the Laredo gateway. In other words, the only rule, regulation or practice that we have in connection with that matter may be summed up in the simple statement "no line haul movement—no car." Furthermore, the policy or practice which we do have, just mentioned, has never, so far as I know, been reduced to

writing or filed or published as a tariff or notice or as a definite statement of our policy, rule, regulation or practice with respect to such matters.

I am somewhat familiar with the facilities of the plaintiff, Brownsville Navigation District of Cameron County, Texas. It has wharves, docks, slips, warehouses, railroad tracks, loading and unloading and cargo-handling machinery and devices of various types, and a great deal of equipment usually found at ports where cargo is interchanged between railroads and vessels. However, the District, so far as my information and observation go, has wholly failed to provide itself with two kinds of equipment which are very essential to the handling and interchange [fol. 116] of such cargo, namely, the locomotive engines and freight cars. Freight cars, of course, can be bought, both new and second hand. Likewise as to locomotives. At the present time, new freight equipment of standard type and design can be purchased for approximately the following prices per car:

Box cars, $2,400.00
Gondola cars, $2,500.00
Flat Cars, $2,400.00

Based upon requisitions which have been made upon us for cars, and upon information which has come to me with respect to the tonnage heretofore moved or consigned to move through the Port of Brownsville, it is my opinion that if the District owned fifty box cars and a hundred gondola cars, that amount of equipment would probably enable it to take care of the volume of traffic described in the petition in this case.

With reference to the interchange of equipment between our line and the Port Isabel Railroad, it should probably be explained that whenever we deliver freight equipment to the Port of Isabel road, we are responsible, if that equipment belongs to some other railroad, to the owner of the car not only for the return of the car itself, but also for all per diem which may accrue on such equipment while it is in the possession of the Port Isabel road. In other words, the foreign line car owner does not know the Port Isabel road is a the transaction at all; we make settlement with the car owner just as though the car had remained on our own rails and we make our own local collection from the Port

Isabel road in the same manner whether the car is one of our cars or is a foreign line car in our possession.

(Signed) T. H. Levy.

Sworn To And Subscribed before me by T. H. Levy this 18th day of February, A. D. 1937. (Signed) Dorothy O'Brien, Notary Public in and for Harris County, Texas. (Seal.)

(Here follows 1 map, side folio 117)

[fol. 118] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION

At Law. No. 952

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, et al.,

vs.

THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, GUY A. THOMPSON, Trustee, et al.

AFFIDAVIT OF H. BOOTH

H. Booth, being duly sworn, deposes and says upon his oath:

I am the General Traffic Manager of the Missouri Pacific Lines in Texas and Louisiana, aggregating about 3,000 miles of operated railroad,. including the International-Great Northern Railroad Company, the San Antonio, Uvalde & Gulf Railroad Company and the so-called Gulf Coast Lines which consists of a number of railroads under common management and control extending from New Orleans, Louisiana, to Brownsville, Texas. In this latter group The St. Louis, Brownsville And Mexico Railway Company is included. I have been General Traffic Manager of this group of railways for about ten years, and have been connected with the Traffic Department of the International-Great Northern, the main line of which extends from Laredo to Longview, Texas, for approximately half a century.

In the petition herein the relators make some charges about alleged "joint" tariffs claimed to have been published by the Trustee of The St. Louis, Brownsville and Mexico Railway Company and other lines, including the Port Isabel & Rio Grande Valley and the Brownsville & Matamoros Bridge Company, For at least a number of years, and certainly during all of the time since the [fol. 119] opening of the port of Brownsville, The St. Louis, Brownsville And Mexico Railway Company, including its Trustees since his qualification, has not published any tariff quoting rates between points in the United States and points in Mexico to which the Port Isabel & Rio Grande Valley Railway Company has been a party in such manner that such tariff might properly be called a "joint" tariff of such two lines. At all times since the opening to commer-

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cial business of the port of Brownsville, including the facilities owned by the plaintiff in this case, the tariff situation with respect to traffic moving by rail between the port of Brownsville and Matamoros and other points in Mexico has been and is as follows:

(1) Port Isabel & Rio Grande Valley Railway Company published its local switching tariff No. 1-A, I. C. C. No. 4, effective July 1, 1936, which, according to the indorsement thereon, contains "switching charges and rules applying on interstate freight traffic handled by the Port Isabel & Rio Grande Valley Railway at Brownsville, Texas." Paragraph (d) of Item 25 of this tariff reads as follows:

"(d) A charge of $8.10 per car will be assessed by the Port Isabel & Rio Grande Valley from interchange connection with the St. L. B. & M. at Brownsville, Texas, to and from points on the Brownsville Navigation District tracks, on all classes and commodities (see Note 2), originating at and destined to points in Mexico (see Note 1).*

"Note 1. Will not apply on traffic covered by Paragraphs (a) or (b).

"Note 2. When loaded by or at the expense of the shipper and unloaded by or at the expense of the consignee."

[fol. 120] A copy of said tariff, marked "Exhibit No. 1" is hereto attached and made a part hereof for all purposes.

It will be noted that the foregoing tariff is exclusively the tariff of Port Isabel & Rio Grande Valley Railway Company and that no other carrier is a party thereto.

(2) Gulf Coast Lines Terminal Charges Tariff No. 490, B. S. L. & W., I. C. C. No. 30, was published effective January 17, 1930, to govern switching and other terminal charges at certain stations, including Brownsville, Texas. Supplement No. 29 to said tariff was issued November 23, 1936, to become effective January 1, 1937, and a copy thereof is hereto attached marked "Exhibit No. 2" and made a part hereof for all purposes. Attention is particularly called to Paragraph (c) of Item No. 240-E by which a switching rate of $3.50 per car is made applicable to movements of carload freight between the interchange connection with other lines, including the Port Isabel road and the interchange between the St. Louis, Brownsville & Mexico Railway Company with the Brownsville & Matamoros Bridge Company. The same item was published in subsequent supplements to said tariff and is now included in Supplement No. 31, which will become

effective February 25, 1937. It will also be noted that neither the Port Isabel & Rio Grande Valley Railway Company nor the Brownsville & Matamoros Bridge Company is a party to the tariff just mentioned, although certain other lines in addition to The St. Louis, Brownsville & Mexico Railway Company, are parties thereto. However, the item just referred to —No. 240-E— is obviously published for the sole account of The St. Louis, Brownsville & Mexico Railway Company.

The item just referred to—No. 240-E—is the same as Item No. 240 which was contained in the original tariff effective [fol. 121] January 17, 1930, except for the amount of the rate. Meanwhile certain increases in rates became effective so that the rate which was on January 17, 1930, $3.15, became, as a result of the increases, $3.50.

(3) Brownsville & Matamoros Bridge Company, effective May 4, 1936, published its bridge tariff, I. C. C. No. 15, showing bridge charges between Brownsville and Matamoros. A copy thereof marked "Exhibit No. 3" is hereto attached and hereby referred to and made a part hereof for all purposes. It will be observed that the Bridge Company is the only party to this tariff although similar tariffs in the past, prior to May 4, 1936, were filed by the Bridge Company in connection with the St. L., B. & M.

Charges for transportation between points in Mexico are shown, of course, in the tariffs of the Mexican lines, although certain of such charges are shown, for information only and without binding effect, in certain tariffs published by the American railways.

Consequently, in order to determine the aggregate charges applicable to the movement of a carload of freight from the port of Brownsville to Matamoros or from Matamoros to the port of Brownsville, it is necessary to determine and to add together the separately established switching charges of the Brownsville & Matamoros Bridge Company, The St. Louis, Brownsville & Mexico Railway Company (Guy A. Thompson, Trustee), and the Port Isabel & Rio Grande Valley Railway. And if the shipment is going to or coming from a point in the interior of Mexico, such as Monterrey, it will be necessary to add to the sum of the foregoing the charges applicable under Mexican tariff for the transportation between Matamoros and the other Mexican point in- [fol. 122] volved. In fact, this is also true of shipments to or from the city of Matamoros proper because the charge of the Brownsville & Matamoros Bridge Company only takes

the car to or from its interchange with the National Railways of Mexico, and it is therefore necessary, even on a car moving to or from Matamoros, to add in the separately established charges of the National Railways from its point of interchange with the Bridge Company to the point of origin or destination in Matamoros. Therefore, there are in every such case not less than four separately established charges which must be added together in order to determine the aggregate charges.

I am familiar with the relationship between The St. Louis, Brownsville & Mexico Railway Company and the Brownsville & Matamoros Bridge Company. The latter is not controlled by the former. The Bridge Company is a corporation of whose capital stock 50 per cent is owned by The St. Louis, Brownsville & Mexico Railway Company, and 50 per cent by the National Railways of Mexico. The control, therefore, lies with neither line because each has an equal interest. As a matter of convenience for some years certain officers of The St. Louis, Brownsville & Mexico Railway Company have been elected to the operating offices with the Bridge Company, but in that capacity they serve, of course, the Bridge Company and are subject to control by its Board of Directors which is selected by the two stock holders of the Bridge Company.

In this connection I have again read Paragraph II of the Plea to the Jurisdiction of the Court filed in this cause by Guy A. Thompson, Trustee. I am familiar with the facts therein stated, particularly those matters relating to the publication of tariffs and establishment of rates, and I now reaffirm what is there set forth.

Reference has been made in the petition to an alleged discrimination in favor of traffic moving through Laredo as [fol. 123] against traffic moving through Brownsville. There are certain differences between the traffic moving through these gateways; which, without intending to make an exclusive enumeration, include the fact that our lines, especially the International-Great Northern, get a line haul, and usually a fairly long one, on traffic moving through the Laredo gateway, whereas on traffic moving between the Port of Brownsville and points in Mexico, no American railway can get a line haul. The most that any of us can secure on this traffic is a small switching charge. Furthermore, on traffic moving through Laredo, other railroads furnish a substantial part of the equipment. For instance,

automobiles frequently go through Laredo into Mexico in cars belonging to some road serving points of manufacture in such states as Michigan. The same, of course, does not apply to traffic moving between Mexican points and the port of Brownsville.

In case of a shipment from the port of Brownsville to Monterrey, it will be noted that the length of haul enjoyed by the several participants, respectively, is as follows: Port Isabel & Rio Grande Valley Railway Company, 7.4 miles The St. Louis, Brownsville & Mexico Railway Co., 2.49 miles Brownsville & Matamoros Bridge Company 1.24 miles National Railways of Mexico 206.23 miles (approximately).

The distinction in my mind between the traffic which normally moves between points in the United States and points in Mexico, such as that, for instance, which normally flows through the Laredo and other gateways and the traffic with which the relators are concerned in this case, is this:

On normal or ordinary traffic originating in the United States and moving to points in Mexico, or in the reverse direction, one or more American railways gets a substantial line haul, and, of course, derives a substantial revenue out of [fol. 124] the line haul rates. And those railroads furnish equipment for the movement of that traffic just as they furnish equipment for the movement of other traffic in which they are interested and out of which they receive proportions of the revenue. As stated above, however, on traffic moving between the port of Brownsville and points in Mexico, no American railway can possibly secure more than a small switching charge which generally cannot be even thought to include the service of furnishing a car for the reason that per diem charges during the free time allowed for loading and unloading would aggregate more than the entire switching charge and thus leave nothing for the actual service of moving the car.

If there were traffic which actually originated at Laredo, Texas, and moved thence into Mexico, it would be comparable in a way to traffic originating at the port of Brownsville and moving into Mexico, but so far as I know or can recall, there is no such traffic moving from Laredo as a point of origin into Mexico.

(Signed) H. Booth.

Sworn To And Subscribed before me this 18 day of February, 1937. (Signed) Mack Scanlon, Notary Public in and for Nueces County, Texas. (Seal.)

EXHIBIT 1 TO AFFIDAVIT

I. C. C. No. 4
(Cancels I.C.C.No. 3)

No Supplement to this Tariff will be issued except for the purpose of cancelling the tariff, unless otherwise specifically authorized by the Commission

Ex A

Port Isabel & Rio Grande Valley Railway

Local Switching Tariff No. 1-A
(Cancels Switching Tariff No. 1)

CONTAINING

SWITCHING CHARGES AND RULES

Applying On

INTERSTATE FREIGHT TRAFFIC

HANDLED BY THE

PORT ISABEL & RIO GRANDE VALLEY RAILWAY

At

BROWNSVILLE, TEXAS

APPLICATION OF EMERGENCY CHARGES

Charges resulting from the rates in this Tariff, as amended, are subject to the provisions of TARIFF OF EMERGENCY CHARGES, Southwestern Lines' Tariff No. 223-A, Agent J. R. Peel's I.C.C. No. 2739, supplements thereto or successive issues thereof.

Shipments handled under this tariff are subject to storage and demurrage rules and charges lawfully on file with the Interstate Commerce Commission.

Issued June 1, 1936.

Effective July 1, 1936.

ISSUED BY
W. A. ELLINGTON, Auditor and G. F. A.
BROWNSVILLE, TEXAS

(1 of 1)

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EXPLANATION OF ABBREVIATIONS

P.I.& R.G.V.....PORT ISABEL & RIO GRANDE VALLEY RAILWAY
St. L.B.& M.....THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY
T.& N.O.....TEXAS AND NEW ORLEANS RAILROAD COMPANY

ITEM	
	DEFINITION OF SWITCHING LIMITS
5	Switching limits at Brownsville, Texas on P.I.& R.G.V. include all tracks west of mile post 6.0 including tracks of the Brownsville Navigation District, which extend from a connection with the P.I.& R.G.V. at a point about 3,500 feet east from mile post 5.5 thence approximately one mile to the Turning Basin and including all tracks located on the property of the Brownsville Navigation District.
	LINE HAUL TRAFFIC DEFINED
10	Line haul traffic is defined as traffic moving via P.I.& R.G.V., St. L.B.& M. or T.& N.O. to or from a point beyond the switching limits of Brownsville, Texas.
	SWITCH MOVEMENT DEFINED
15	(a) The switching charges published herein apply on a loaded car and the return of the same car empty, or on an empty car and the return of the same car loaded. If car is moved under full or partial load in both directions the switching charge will be assessed for the movement in each direction. (b) If car is moved empty in both directions the switching charge will be assessed in one direction only. (c) The term "loaded car", as used in this tariff, means a car containing traffic tendered on one bill of lading from one consignor to one consignee and destination at one place of delivery.
	EXTRA SWITCHING SERVICE
20	When a loaded or empty car is switched or placed for loading, or unloading, and is moved to another location upon instructions of consignor or consignee as the case may be, the movement will be considered as separate movement and charges provided in Item 25 herein will be assessed for such separate movement.
	SWITCHING CHARGES AT BROWNSVILLE, TEXAS
25	(a) A charge of &$2.25 per car will be assessed on shipments originating at or destined to Aransas Compress Company, when delivered to or received from interchange connections with the St.L.B.& M. or T.& N.O. at Brownsville, Texas, on which those lines receive a line haul. (b) A charge of $6.30 per car will be assessed on shipments originating at or destined to tracks east of mile post 5.5 including tracks of Brownsville Navigation District, when delivered to or received from interchange connections with the St.L.B.& M. or T.& N.O. at Brownsville, Texas, on which these lines receive a line haul. (c) A charge of &$5.50 per car will be assessed by the P.I.& R.G.V. from interchange connection with the St.L.B.& M. at Brownsville, Texas to Aransas Compress Company on cotton originating in Mexico. (See notes 1 and 2). (d) A charge of $8.10 per car will be assessed by the P.I.& R.G.V. from interchange connection with the St.L.B.& M. at Brownsville, Texas to and from points on the Brownsville Navigation District tracks, on &all classes and commodities, (See note 2), originating at or destined to points in Mexico. (See note 1). (e) A charge of $8.10 per car will be assessed by the P.I.& R.G.V. between industry or team tracks on the P.I.& R.G.V. within the Brownsville switching limits, also between such tracks and points on the Brownsville Navigation District tracks, on &all classes and commodities. (See notes 1 and 2).

(Concluded on next page)

& - Reduction.

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ITEM	
	SWITCHING CHARGES AT BROWNSVILLE, TEXAS - Concluded
25	(f) A charge of $8.10 per car will be assessed by the P.I.& R.G.V. between interchange connections with the St.L.B.& M. or T.& N.O. and points on the Brownsville Navigation District tracks on all classes and commodities (See Note 2), originating on or destined to industry or team tracks on said lines within the Brownsville switching limits. (See note 1). Note 1. - Will not apply on traffic covered by paragraphs (a) or (b). Note 2. - When loaded by or at the expense of the shipper and unloaded by or at the expense of the consignee.
	WEIGHING OF CARS
30	The P.I.& R.G.V. will not weigh cars handled under the rates or charges named in this tariff.

♦ - Reduction.

EXHIBIT 2 TO AFFIDAVIT

APPLICATION OF TARIFF OF EMERGENCY CHARGES

Except as otherwise provided herein, charges resulting from the rates in this Supplement are subject to Tariff of Emergency Charges, as provided in Supplement No. 24 (or successive issues thereof.)

SUPPLEMENT NO. 30 TO
R.C.T. NO.74
Cancels Supplement No. 28
Supplements Nos. 24, 29 and 30 contain all changes from the original Tariff that are effective on the date hereof.

SUPPLEMENT NO. 29 TO
I.C.C. NO.30
Cancels Supplement No. 28
Supplements Nos. 24 and 29 contain all changes from the original Tariff that are effective on the date hereof.

GULF COAST LINES

FREIGHT TARIFF OF

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY

(Guy A. Thompson, Trustee)

in connection with

[10] HOUSTON BELT & TERMINAL RAILWAY COMPANY (FX-4 NO. 3)
① INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY (FX-4, NO. 67)
(Guy A. Thompson, Trustee)
THE ORANGE & NORTHWESTERN RAILROAD COMPANY (FX-4, NO. 39)
RIO GRANDE CITY RAILWAY COMPANY (FX-4, NO. 1)
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY (FX-4, NO. 41)
(Guy A. Thompson, Trustee)
SAN BENITO AND RIO GRANDE VALLEY RAILWAY COMPANY (FX-4, NO. 1)

SUPPLEMENT NO. 30
Cancels Supplement No. 28
Supplements Nos. 24, 29 and 30 contain all changes

to

TERMINAL CHARGES TARIFF NO. 490

Publishing

RATES, RULES AND REGULATIONS

Governing

SWITCHING, DRAYAGE, HANDLING AND TRANSFER CHARGES

also

Dunnage Charges,
Mileage on Private Car Equipment,
Order Notify Shipments,
Stop-over Privileges on Cars in Transit,
Transportation of Empty Tank, Horse, Poultry and Cattle Car Equipment.

and

OTHER TERMINAL CHARGES

APPLICABLE AT STATIONS SHOWN IN ITEM NO. 15

on the

Beaumont, Sour Lake & Western Railway.
Orange & Northwestern Railroad.
St. Louis, Brownsville and Mexico Railway.
San Benito and Rio Grande Valley Railway.
Rio Grande City Railway Company.

◆ Denotes Intrastate Application only.
① Applicable only in connection with paragraph (e) of Item No. 187, or reissues.
[10] Reissued from Supplement No. 10, effective July 20, 1931.

ISSUED NOVEMBER 23, 1936

EFFECTIVE JANUARY 1, 1937.
(Except as otherwise provided herein.)

Issued by
J.E. BAILEY,
General Freight Agent,
Room 402, Union Station,
HOUSTON, TEXAS.

File 1-148, 16-148, 79-148, 4-260,
1-1377, I.& S. 3517.
Case 29.

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36249
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Printed in U. S. A.

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EXPLANATION OF ABBREVIATIONS

Refer to explanation of abbreviations shown on Page 3 of Tariff and make the following addition:

ABBREVIATION	EXPLANATION
P.I.& R.G.V.	Port Isabel and Rio Grande Valley Railway.

2 Item No. 20-A, Cancels No. 20.

NON-COMPETITIVE POINTS

(Applicable on Interstate Traffic Only)

The term non-competitive points, as used in this Tariff, is defined as follows:

Points reached only by the rails of the N.I.& N.; N.O.T.& M.; B.S.L.& W.; O.& N.W., and points reached by the rails of railroads having track connection with N.I.& N.; N.O.T.& M.; B.S.L.& W., and O.& N.W. only, except Blanks, La., Call, Texla and Wiergate, Texas. (See Item No. 25, or reissues). (File 1-260).

25 Item No. 25-B, Cancels No. 25-A.

COMPETITIVE POINTS

(Applicable on Interstate Traffic Only)

The term "competitive points" as used in this Tariff, is defined as follows:

Points not included in Item No. 20, but including Blanks, La., Call, Texla and Wiergate, Texas, also points of origin included in Item No. 20 to points of destination on these lines where the traffic can also be handled from such points of origin or to such points of destination via lines other than these lines.

27 Item No. 32.

FREE TIME TO ACCUMULATE CARLOAD SHIPMENTS OF COFFEE

On shipments of Coffee, when handled direct from shipside to depot of these lines, not exceeding fifteen (15) days' free time will be allowed, from date the initial part of the shipment is delivered these lines, to complete the entire lot as shown on the shipping ticket. Part of the incomplete lots, constituting carloads, will be forwarded to destination at discretion of these lines. (File 1-276-12).

4 Item No. 70-A, Cancels No. 70.

RENTAL DOUD STOCK CAR COMPANY CARS

Cancel. Obsolete. Company out of business.

4 Item No. 75-A, Cancels No. 75.

RENTAL MATHER STOCK CAR COMPANY CARS

Cancel. Obsolete. No special charge applicable.

4 Item No. 80-A, Cancels No. 80.

RENTAL VENICE TRANSPORTATION COMPANY CARS

Cancel. Obsolete. Company out of business.

15 Item No. 85-C, Cancels No. 85-B.

RENTAL OF ARMS-YAGER RAILWAY CAR COMPANY

Cancel. Charges published by Arms-Yager Railway Car Company in their Tariff No. 2 18, or reissues, will apply.

4 Item No. 90-A, Cancels No. 90.

RENTAL OF LEMAC CARRIERS POULTRY CARS

Cancel. Obsolete. Company out of business.

9 Item No. 95-B, Cancels Nos. 95 and 95-A.

(Applicable on Interstate Traffic only)

MINIMUM CARLOAD WEIGHT ON FREIGHT SHIPPED IN CARS OF GREATER OR LESS CAPACITY THAN ORDERED BY SHIPPERS, OR IN NEW, REBUILT OR DEFECTIVE CARS

① FREIGHT SHIPPED IN LARGER CARS THAN ORDERED

1. (a) When a car of certain dimensions or capacity is ordered by a shipper, and Agents of these companies are unable to furnish a car of the size ordered, a larger car may be furnished and used, and the carload minimum weight applicable upon the size of the car ordered will be applied (provided the shipment could have been loaded into or upon car of the capacity or size ordered).

(b) In cases where a car of greater length is furnished at these companies' convenience, the rules of the current Tariffs or classifications providing for increased weights on cars of extra length will not govern.

(c) The waybill and bill of lading for such shipments, where short car minimum weight is applied must bear notation that the short car was ordered but could not be furnished, and that the freight shipped could actually have been loaded in a car of the size ordered by the shipper, giving capacity of the car ordered, with date of order, and the number, initials and capacity of the car furnished.

(d) These instructions must not be construed as authorizing collection of freight charges at the minimum weight of the car ordered, when actual weight is greater, and must in no way interfere with instructions for weighing carload shipments to ascertain correct weights.

① FREIGHT SHIPPED IN SMALLER CARS THAN ORDERED

2. (a) When a shipper orders a car of greater dimensions or capacity than can be furnished by these companies, a smaller car may be furnished and used, and freight charges collected on basis of actual weight when the car is loaded to its visible capacity. If the smaller car is inadequate to handle the shipments, two smaller cars may be furnished and used, and freight charges collected on basis of minimum weight provided for in cars of size ordered; all freight in excess of the minimum weight to be charged for on basis of the carload rate.

(b) The waybill and bill of lading must show the capacity of the car ordered, with date or order and the number, initials and capacity of the car or cars furnished.

(Concluded on following page)

① Applicable only in connection with shipments of Furniture, Iron and Steel Containers, Iron and Steel Tanks and Fibreboard and Pulpboard Boxes.

For explanation of other reference marks, see page 3.

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9 Item No. 95-B, Cancels Nos. 95 and 95-A--Concluded.

FREIGHT SHIPPED IN NEW, REBUILT OR DEFECTIVE CARS

3. Freight loaded in new or rebuilt cars making initial trips, or in defective cars which cannot be safely loaded to the minimum weight provided in Tariffs or classifications, will be subject to the minimum weight provided in Tariffs or classifications but not to exceed 40,000 pounds. (Will not apply on shipments of Forest Products nor on refrigerator or insulated cars).

13 Item No. 105-C, Cancels No. 105-B.

PAYMENT OF TOLLS ON TELEGRAMS AND ON TELEPHONE CONVERSATIONS

(See Exceptions) (R.N. 1261)

Tolls on messages by telegraph, telephone, cable or radio signed by, or sent for account of, shippers, consignees or their agents or representatives relative to routing or other railroad service in connection with shipments of freight, will not be assumed by the carriers, excepting that when such toll is upon a collect answer to telegraph or telephone messages initiated by the carriers, relating to the traffic of the shipper or consignee, same may be assumed by the carriers.

EXCEPTIONS

These lines will transmit over their respective telegraph lines, free of cost, such telegraph instructions from shippers to messengers in charge of carload shipments of Tropical Fruits, that may be necessary in the routing, cars or delivery of such shipments, the messages to be transmitted from and to carriers' representatives to carry out shippers' instructions.

20A Item No. 125-B, Cancels No. 125 and 125-A.

FURNISHING DOOR BOARDS ON CARLOAD SHIPMENTS OF BULK FREIGHT

Suitable door boards will be furnished free of charge at all loading stations for use in coopering cars for carload shipments of any bulk freight requiring such protection. Such material will be considered as a part of the car, and no charge will be made for transporting same. If supply of door boards at any station should run short, the local agent should secure authority from the operating department to purchase the necessary lumber until supply of door boards is replenished. (See Exception).

3 EXCEPTION--These rules will not apply on Grain, Grain Products, Seeds and other articles taking same rates, named in Western Trunk Lines' Tariff No. 330, Agent L.E. Kipp's I.C.C. No. A-2579. For rules, see Item No. 70 of that Tariff.

6 Item No. 127.

BULKHEADING OF CARS OF FLAXSEED, GRAIN OR MILLET SEED

(Rate Notice No. 29662)

Where bulkheads or partitions are used to separate a carload shipment of one or more kinds of grades of bulk Grain or carload shipment of one or more kinds of bulk Grain and Flaxseed or Millet Seed, or both, from one consignor to one consignee, such shipment will be transported at owner's risk of mixing. In such cases a charge of $5.00 per car in addition to the rates applicable will be assessed for permitting the installation of such bulkheads or partitions. The installation, removal and cost of material of such bulkheads or partitions must be done by and at the expense of the owner or shipper.

27 Item No. 155-C, Cancels No. 155-B.

ABSORPTION OF SWITCHING CHARGES OF CONNECTING LINES AT JUNCTION POINTS IN TEXAS

(Applicable on Interstate Traffic only. For Intrastate Absorptions, see Item No. 290 of Tariff, as amended).

(a) On carload competitive traffic (see Item No.25-B of Tariff), these lines will absorb connecting lines' switching charges as published and lawfully on file with the Interstate Commerce Commission, only as provided in Items Nos. 155-2 to 155-14, inclusive. (File 79-148-7).

(b) On non-competitive traffic (see Item No. 20-A of Tariff), except as provided in paragraph (c), the switching charges as lawfully on file with the Interstate Commerce Commission will be in addition to the rate.

(c) On carload shipments of Lumber and articles taking same rates, except as otherwise provided, originating at non-competitive points where the rate is 15 cents per 100 pounds or higher, these lines will absorb the switching charges of connecting lines necessary to effect delivery at destination, only as provided in Items Nos. 155-2 to 155-14, inclusive. (File 79-148-7).

(d) } Cancelled. Provisions published in Item No. 163 will apply.
(e) }

ABSORPTIONS IN DOLLARS AND CENTS PER CARS

Item No.	AT	ON ALL CARLOAD TRAFFIC BETWEEN Interchange Connection on	AND Industries Located on	MAXIMUM AMOUNT OF ABSORPTION (See Item No. 155-C, or reissues).
27 155-2	Bay City. . . . . Texas	St.L.B.& M..	G.C.& S.F.	$5.50
			T.& N.O.	2 $8.65

2 Not filed with the Interstate Commerce Commission.
3 Applicable only on Interstate traffic.
2 Includes intermediate switching charge of $3.15 per car assessed by G.C.& S.F.
2 Reissued from Supplement No. 2, effective April 14, 1930.
4 Reissued from Supplement No. 4, effective May 25, 1930.
6 Reissued from Supplement No. 6, effective July 24, 1930.
9 Reissued from Supplement No. 9, effective May 1, 1931.
15 Reissued from Supplement No.15, effective June 25, 1932.
19 Reissued from Supplement No.19, effective August 1, 1933.
26 Reissued from Supplement No.26, effective August 1, 1935.
26A Reissued from Supplement No.26, effective July 1, 1935.
27 Reissued from Supplement No.27, effective September 16, 1935.

ABSORPTIONS IN DOLLARS AND CENTS PER CARS

Item No.	AT	ON ALL CARLOAD TRAFFIC BETWEEN Interchange Connection of	ON ALL CARLOAD TRAFFIC AND Industries located on	MAXIMUM AMOUNT OF ABSORPTION (See Item No. 156-C, or reissues).
[27] 155-4	Beaumont. . . . . Texas	B.S.L.& W.	G.C.& S.F. . . . . K.C.S. . . . . T.& N.O.	$5.50
[27] 155-6	Brownsville . . . . Texas	St.L.B.& M..	T.& N.O.	$5.50
[28] 155-7	Brownsville . . . . Texas (File 79-148-5)	St.L.B.& M..	P.I.& R.G.V. Aransas Compress Co.	$2.25
			P.I.& R.G.V. East of Mile Post 5.5. . . .	$6.30
[27] 155-8	Corpus Christi. . . Texas	St.L.B.& M..	S.A.U.& G. . . . . T.& N.O. . . . . Tex.Mex.	$5.50
[27] 155-10	Houston. . . . . .Texas (See also Item No. 163)	B.S.L.& W. . . . . or St.L.B.& M..	Burlington-Rock Island. . . . . G.C.& S.F. . . . . I.-G.N.. . . . . M.-K.-T. of T. . . . . T.& N.O.	$8.10
[27] 155-12	Orange . . . . . .Texas	O.& N.W.	T.& N.O.	$5.50
[27] 155-14	All junction points on these lines except those named in Items Nos.155-2 to 155-12, inclusive.	B.S.L.& W. . . . . O.& N.W. . . . . St.L.B.& M.. . . . . or S.B.& R.G.V.	Connecting Lines . . .	$5.50

Reissued from Supplement No. 27, effective September 16, 1935, except as noted.
Item No. 163.

APPLICATION OF HOUSTON, TEX., RATES TO CLINTON, PASADENA, TEX., ETC.

(a) On all carload traffic originating or destined to the following points: Hoffman Oil & Refining Co. Switch, Texas; Clinton, Texas; Fidelity, Texas; Galena, Texas; Pasadena, Texas; Sinco, Texas; these lines will protect Houston, Texas, (D), export, import or coastwise rates published and lawfully on file with the Interstate Commerce Commission and absorb switching charge of $8.10 per car as published in T.& N.O. Ry. Co.'s I.C.C. No. Tex.-49, supplements thereto or reissues thereof. (File 1-148).

(b) On all carload traffic originating or destined to points on the Port Terminal Railroad Association of Houston, Texas (as named in Texas Lines' Tariff No. 51-A, Agent H.B. Cummins' I.C.C. No. 341 (B.S.L.& W. No. 775-A), or reissues), these lines will protect Houston, Texas, domestic interstate, export or import rates published and lawfully on file with the Interstate Commerce Commission. (File 105-78).

[18] Item No. 187.

SWITCHING OF LESS CARLOAD SHIPMENTS

(a) These lines will switch, at the rates contained in this Tariff, freight subject to less than carload or any quantity rates, the aggregate weight of which is 6,000 pounds or more, on Interstate or Interstate and Intrastate traffic, from one or more shippers to one or more consignees, received for shipment or to be delivered at the same warehouse or industry.

(b) No extra charge will be made for switching between yards or warehouses and industries on these lines of freight subject to less than carload or any quantity rates the aggregate weight of which is 6,000 pounds or more, on Interstate or Interstate and Intrastate traffic, from one or more shippers to one or more consignees, received for shipment or to be delivered at the same warehouses or industry, which is forwarded or received in road-haul service.

(c) These lines will absorb the lawful terminal switching charges of connecting lines at origin and/or destination, published in Tariffs filed with the Interstate Commerce Commission, between yards or warehouses on these lines and industries on connecting lines of freight subject to less than carload or any quantity rates, the aggregate weight of which is 6,000 pounds or more, on Interstate or Interstate and Intrastate Traffic, from one or more shippers to one or more consignees, received or to be delivered at the same warehouse or industry, which is forwarded or received in road-haul service.

(d) In lieu of performing switching service under paragraphs (a), (b) and (c) hereof, and/or absorbing the switching charges of connecting lines, as published in paragraph (c) hereof, these lines, at its option, will perform the service equivalent to switching by motor-vehicle transport or by drayage, at its expense, provided no payment is made to shipper or consignee for motor vehicle or drayage service involved.

(e) The provisions of paragraph (d) will also apply on shipments aggregating 6,000 pounds or more, received or to be delivered at the same warehouse or industry, at Houston, Texas, when line haul service is to be or has been performed jointly by the International-Great Northern Railroad and The Beaumont, Sour Lake & Western Railway and/or The St.Louis, Brownsville and Mexico Railway. (File 6-481).

(D) Reference to domestic Interstate rates cancelled. Reissued from Supplement No. 3, effective May 15, 1930.
[18] Reissued from Supplement No. 15, effective June 25, 1932.
[27] Reissued from Supplement No. 27, effective September 16, 1935.
[28] Reissued from Supplement No. 28, effective June 1, 1936.

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(22) Item No. 195-A, Cancels No. 195.

SWITCHING CHARGES OF CONNECTING LINES AT JUNCTION POINTS

Cancel. Other charges provided in this tariff will apply.

SWITCHING AT POINTS ON B.S.L.& W. RY., O.& N.W. R.R., S.S.C. RY., ST.L.B.& M. RY. AND S.B.& R.G.V. RY.

Applicable on Interstate traffic. For switching charges on Texas Intrastate traffic, see Items Nos. 280 to 290, or reissues thereof.

Item No.	Switching At	On	From or To Interchange Connection with	To and From Industries and Warehouses Located On	Switching Rate Per Car
(21) 210-A Cancels 210	Beaumont. . . . . Texas (File 4-260-7)	All Carload Freight	T.& P.S. Ry. . . . . T.& N.O. R.R., direct. . G.C.& S.F. Ry., direct. .	B.S.L.& W. Ry.	$5.50
(21) 212-A Cancels 212	Houston. . . . . Texas (File 1-148-13)		Connecting Lines	B.S.L.& W. Ry. . . . . St.L.B.& M. Ry.	$8.10
(22) 220-A Cancels 220	Beasmay . . . . . Texas		G.C.& S.F. Ry., direct. .	O.& N.W. R.R.	$5.50
(22) 225-A Cancels 225	Orange. . . . . Texas		T.& N.O. R.R., direct . .	Municipal Docks. . . . . O.& N.W. R.R.	$5.50
(21) 228	Bay City. . . . . Texas (File 4-260-7)		T.& N.O. R.R. . . . . G.C.& S.F. Ry.	St.L.B.& M. Ry.	$5.50
(22) 230-B Cancels 230-A	All junction points on B.S.L.& W., O.& N.W., St.L.B.& M. and S.B.& R.G.V. Railroads, except as shown in Items Nos. 210 to 235 of Tariff, as amended.		Connecting Lines	B.S.L. & W., O.& N.W., St.L.B.& M., or S.B.& R.G.V.	$5.50

SWITCHING AT BROWNSVILLE, TEXAS

Item No.	COMMODITY	BETWEEN	AND	Switching Rate Per Car
(CD) 240-E Cancels 240-D	ALL CARLOAD FREIGHT, EXCEPT AS OTHERWISE SHOWN TO OR FROM POINTS IN MEXICO. (File 16-148-7)	(a) St.L.B.& M. Ry. team tracks within switching limits of Brownsville, Texas, including Harrison Street team track, Fourteenth Street team track and Freddo team track.	Interchange of the St.L.B.& M.Ry. with the Brownsville & Matamoros Bridge Co. (Rate includes movement of car one way only)	♦ $8.10 (See Notes 1 and 2)
		(b) St.L.B.& M. Ry. industry tracks within switching limits of Brownsville, Texas.		♦ $7.00 (See Notes 1 and 2)
		(c) Interchange connection with other lines.	Interchange of the St.L.B.& M. Ry. with the Brownsville & Matamoros Bridge Co.	(C) $8.15 ♦ (C) $5.50 ♦ (CD) $4.05 (See Note 3)
		(d) Fumigating plant at Brownsville, Texas.	Interchange connection of the St.L.B.& M. Ry. with the Brownsville & Matamoros Bridge Co. on shipments originating in Mexico. (Includes movement of car in both directions.)	♦ $4.00 (See Note 3)

NOTE 1—Carload shipments received from the National Railways of Mexico, subject to the charge named in paragraphs (a) or (b) of this item, will be charged $8.10 per car for each subsequent movement on the Brownsville Terminal of the St.L.B.& M. Ry. or to the interchange connections with other lines.
NOTE 2—On cars handled through the fumigating plant, the charge named in paragraph (d) of this item will be in addition.
NOTE 3—Charges provided in paragraph (d) will not be absorbed.

♦ Indicates advance.
(C) Applicable only on traffic originating or destined points beyond Brownsville, Texas, upon which connecting lines have or will secure line haul.
(C) Applicable on traffic originating or destined industry tracks of connecting lines within the switching limits of Brownsville, Texas.
(CD) Applicable on traffic originating or destined team tracks of connecting lines within the switching limits of Brownsville, Texas.
(21) Effective January 1, 1937.
(22) Reissued from Supplement No. 21, effective January 7, 1935.
Reissued from Supplement No. 22, effective December 15, 1934.
Reissued from Supplement No. 23, effective January 15, 1935.

SWITCHING CHARGES AT STATIONS ON THE B.S.L.& W. RY., O.& N.W. R.R., R.G.C. RY., ST.L.B.& M. RY. AND S.B.& R.G.V. RY.--Concluded
SWITCHING AT BROWNSVILLE, TEXAS

Item No.	COMMODITY	FROM	TO	Switching Rate Per Car
(D) 245-A Cancels 245	LIVESTOCK ORIGINATING OR DESTINED MEXICO AND UNLOADED FOR FEED, REST OR OTHER PURPOSES. (File 16-148-7)	Stock Pens at Brownsville .Texas	Interchange Connection of the St.L.B.& M. Ry. with the Brownsville & Matamoros Bridge Co.	♦ $7.00

(20) Item No. 246.

FURNISHING REFRIGERATOR CARS AT BROWNSVILLE, TEXAS

Refrigerator cars, if supplied by these lines for the purpose of loading at Matamoros, Mexico, with freight for delivery within the Brownsville switching limits, will be subject to a charge of $5.00 per car in addition to switching charges assessed under other provisions of this Tariff. (File 16-148-13)

(28) Item No. 247.

SWITCHING AT BROWNSVILLE, TEXAS

On all carload freight moving between team tracks on the St.L.B.& M.,on the one hand and points on the P.I.& R.G.V., on the other hand, within the switching limits of Brownsville, Texas, where no line haul is involved, the St.L.B.& M., will assess a charge of $7.50 per car between the team tracks on the St.L.B.& M. and interchange connection of the P.I.& R.G.V. (File 79-148-5)

(5) Item No. 252.

SWITCHING OF RAILROAD EQUIPMENT

(Applies in Connection with Shipments Receiving Road Haul)
(R.C.T. Circular No. 8261 of March 31, 1930)

(a) When any of the following equipment on its own wheels (cabooses, empty; express cars, empty or loaded and dead locomotives) is switched for account of other lines, the charges will be $6.30, except on dead locomotives the charge will be $12.00 (See Note).

(Applies Only on Intra-Plant, Intra-Terminal or Inter-Terminal Switching)

(b) When any of the following equipment on its own wheels (cabooses, empty; express cars, empty or loaded and dead locomotives) is switched for account of other lines the charge will be $8.10 each, except on dead locomotives the charge will be $15.50 each. (See Note)

NOTE--The above charges apply to one-way movements, except when express cars are loaded in one direction and empty in the other the charge shall apply to the round trip movement. When express cars, empty or loaded, are handled for account of express companies, no charge will be made for switching to or from industries located on switching line's track or for switching to or from connections with other lines, provided the switching line performs the road haul. If the switching line does not perform road haul such service will be charged for as per paragraphs (a) or (b) above.

(2) Item No. 265-A, Cancels No. 265.

SWITCHING AT CALL, TEXAS
(Applicable on Interstate and Intrastate Traffic)
Rates in Dollars and Cents Per Car

COMMODITY	FROM	TO	RATE
LUMBER, carloads. . . .	Call. . . . . Texas	O.& N.W. R.R. Co. connections, G.C.& S.F. Ry. Co.	$1.50 (See Note)

NOTE--On carload shipments of Lumber delivered to O.& N.W. R.R. Co. through the Kirby Tram on which line haul will be performed, the O.& N.W. R.R. Co. will pay to the Kirby Lumber Company $1.50 per car to cover switching. No charge will be made for handling empty cars in opposite direction. This amount includes any charge made by the G.C.& S.F. Ry. Co. covering trackage rights. (C.F.-202-25)

No per diem reclaim will be allowed the G.C.& S.F. Ry. Co. or Kirby Lumber Company on this switching. (File 4-280)

(3) Item No. 272.

SWITCHING TO OR FROM ORANGE TERMINAL ASSOCIATION, ORANGE, TEXAS
(File 76-148)
(Applicable only on Interstate Traffic)

A charge of $8.10 per car (see Note) on all classes and commodities loaded by and at the expense of the shipper, and unloaded by and at the expense of the consignee, between industries and team tracks on the Orange & Northwestern Railroad Company within the established switching limits of Orange, Texas, on the one hand, and points on the facilities operated by the Orange Terminal Association at Orange, Texas, on the other hand.

NOTE--The rate of $8.10 per car is a net charge for the switching service described and does not include any terminal or other charges as provided for in Texas Lines' Tariff No. 21-K, Agent A.C. Fonda's I.C.C. No. 284, or reissues, or in individual issues of carriers on file with the Interstate Commerce Commission.

♦ Indicates advance.
(D) Effective January 1, 1937.
(2) Reissued from Supplement No. 2, effective April 14, 1930.
(5) Reissued from Supplement No. 5, effective June 25, 1930.
(6) Reissued from Supplement No. 6, effective July 24, 1930.
(20) Reissued from Supplement No.20, effective October 20, 1933.
(28) Reissued from Supplement No.28, effective June 1, 1936.

Reissued from Supplement No. 16, effective October 26, 1932, on Interstate Traffic.
Reissued from Supplement No. 16, effective September 15, 1932, in Supplement H, on Intrastate Traffic.
Item No. 302-B, Cancels No. 302-A.

SWITCHING LIMITS HOUSTON, TEXAS, ON B.S.L.& W. AND ST.L.B.& M.

Switching limits in Houston, Texas, will be as defined in Houston Belt & Terminal Railway Company (Operating terminal facilities for account of The Beaumont, Sour Lake & Western Railway and The St.Louis, Brownsville and Mexico Railway) Switching Tariff No. 1-W, I.C.C. No. 4[illegible], R.C.T. No. 13, supplements thereto or reissues thereof. Also will include points on the tracks operated as the Port Terminal Railroad Association (which trackage is, by virtue of contract with the Harris County Houston Ship Channel Navigation District Board, a part of The Beaumont, Sour Lake & Western Railway Company and The St.Louis, Brownsville and Mexico Railway Company's facilities), said limits extending on the north side of the Ship Channel to the Carnegie Steel Plant and Jones Ship Yard, including the Texas Company (Galena Refinery) and the Haden Lime Company, also the American Petroleum Company (industry tracks owned by the American Petroleum Company at Norsworthy, viz.: Track No. 1 length 5,442 feet from connection with the Port Terminal Railroad Association and Track No. 2 length 952 feet and Track No. 3 length 877 feet, diverging from Track No. 1) and on the south side of the Ship Channel to the Shell Petroleum Corporation Plant, including points west thereof on the tracks operated by the Port Terminal Railroad Association. For list of the industries located on such tracks see Texas Lines' Tariff No. 51-Z, Agent A.C. Fonda's I.C.C. No. 327, or reissues. (File 1-148)

SWITCHING LIMITS OF THE STATIONS SHOWN BELOW ARE AS FOLLOWS:
SWITCHING LIMITS

Item No.	STATION AND ROAD	Points From Which Mile Post Location Shown Herein is Computed	FROM MILE POST DIRECTION	TO MILE POST DIRECTION
[R] 315-A Cancels 315	O.& N.W. Orange, ... Texas (See Note)	Brownsville. . . Texas	Switching limits extend to.	C-488.00 on East.
NOTE--Switching limits also include points on the trackage operated as the Orange Terminal Association, which trackage is by virtue of an agreement between the interested carriers and the City of Orange, Texas, a part of the said Orange & Northwestern Railroad facilities. (Certificate of Public Convenience and Necessity, I.C.C. Finance Docket No. 7988 of February 26, 1930.) (File 334-106)				
[R2] 317	ST.L.B.& M. Bay City. . . . . Texas	Brownsville. . . Texas	284.8 on north	283.3 on south.
[R2] 333	ST.L.B.& M. Gretna. . . . . Texas	Brownsville. . . Texas	194.3 on north	192.9 on south.
[R3] 390	S.B.& R.G.V. Wantz . . . . . Texas	San Benito . . . Texas	20.0 on east	21.3 on west.

[R] Reissued from Supplement No. 4, effective May 25, 1930.
[R2] Reissued from Supplement No.13, effective November 12, 1931.
[R3] Reissued from Supplement No.18, effective June 28, 1933.

EXHIBIT 3 TO AFFIDAVIT

No Supplement to this Tariff will be issued except for the purpose of cancelling the Tariff unless otherwise specifically authorized by the Commission.

3

I.C.C. NO. 15
Cancels I.C.C. No. 14

GULF COAST LINES

BROWNSVILLE & MATAMOROS BRIDGE COMPANY

in connection with

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY (● ①Eliminate)
(Guy A. Thompson, Trustee)

JOINT BRIDGE CHARGES TARIFF NO. 1178-N

Cancels Tariff No. 1178-M

Showing

BRIDGE CHARGES

between

BROWNSVILLE, TEXAS

and

MATAMOROS, (TAMAULIPAS) MEXICO

Governed, except as otherwise provided herein, by Southwestern Lines' Mexican Freight Classification No. 1-E, Agent J.R. Peet's I.C.C. No. 2725, supplements thereto or reissues thereof.

ISSUED APRIL 1, 1936. EFFECTIVE MAY 4, 1936.

All changes in this Tariff result in reductions, except as otherwise indicated.

● Indicates advance.
①Eliminated account not participating in charges.

Issued by
J. E. BAILEY,
General Freight Agent,
Room 402, Union Station,
HOUSTON, TEXAS.

O. C. OLSEN,
General Foreign Freight Agent,
Missouri Pacific Lines,
ST. LOUIS, MO.

File 3-409
Case 39

(Printed in U.S.A.) (125 - Authy. 3709)

135

97

Joint Bridge Charges Tariff No. 1178-N.

CANCELLATION NOTICE

Rates formerly published in Brownsville & Matamoros Bridge Company's Joint Bridge Charges Tariff No. 1178-M, I.C.C. No. 14, and not brought forward herein, are hereby cancelled. Other provisions in this Tariff will apply.

Item No. 1. APPLICATION

The rates named in this Tariff apply:
Between Matam (Tamaulipas), Mexico, and Brownsville, Texas, on all traffic.

Item No. 2. BRIDGE TOLLS ON COMMODITIES OF ALL KINDS
(except those shown in Item No. 3, See Note 1)

Rates in Cents (United States Currency) Per 1,000 Kilos (2,204.6 Pounds).

CLASSES											
1	2	3	4	5	6	7	8	9	10	11	12
46½	44½	42½	40½	38	36	34	32	29½	27½	25½	23½

The minimum charge between Brownsville, Texas, and Matamoros, Mexico, to be 28 cents (United States Currency) for each shipment.

Item No. 3. MISCELLANEOUS RATES

Rates in cents (United States Currency) Per 1,000 Kilos (2,204.6 Pounds), Except as Noted.

COMMODITIES	RATE
Railway Material and Supplies, property of National Railways of Mexico or railroads party to this Tariff	12
Locomotives, on own wheels, (see Note 1) Each	278
Coaches and Cars, on own wheels, (see Note 1) Each	139
Cotton Seed Cake, minimum weight 44,092 pounds (20,000 Kilos)	23½

The minimum charge between Brownsville, Texas, and Matamoros, Mexico, to be 28 cents (United States Currency) for each shipment.

NOTE 1--Applicable only where reference is made hereto, Railway Materials, including rolling stock and other goods for use of National Railways of Mexico, 50 per cent of rates and minimum charge shown in this tariff.

- F I N I S -

[fol. 137] Mr. Tallichet: I offer in evidence the affidavit of L. S. Bourne, and I would like to file a supplemental brief if advised to do so. I think Mr. Kelley's brief will satisfy me, but I would like to file the supplemental brief if I think it is necessary.

(The affidavit of L. S. Bourne was received in evidence and marked "Respondent's Exhibit 2 for identification," and is as follows:)

RESPONDENT'S EXHIBIT 2

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION

No. 952. At Law

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, et al, Relators,

vs.

ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, et al, Respondents

Affidavit of L. S. Bourne

Before me, the undersigned authority, on this day personally appeared L. S. Bourne, who, being by me duly sworn, deposes and says:

My name is L. S. Bourne and I am a resident of the City of Brownsville, in the Southern District of Texas, and have been for eleven years last past. During said period I have been and am now General Manager of Port Isabel & Rio Grande Valley Railway and of its predecessor in title, Rio Grande Railway. Said first named Company owns and operates and said second named Company formerly owned and operated the line of railroad extending from Brownsville, Texas, to Port Isabel, Texas, a distance of approximately 20 miles. Said first named Company owns and operates a connecting track approximately 3,500 feet in [fol. 138] length, extending from the main line of said Company to certain tracks owned by the relator, Brownsville Navigation District of Cameron County, Texas, and said first named Company operates said last mentioned tracks.

All of the operations of said Port Isabel & Rio Grande Valley Railway on the properties of the relators and between the properties of the relators herein and points of connection with other railroads in the City of Brownsville, Texas, are as a switching carrier and not as a line-haul carrier. The sole and only compensation of said Port Isabel & Rio Grande Valley Railway is a switching charge or allowance of $6.30 per car where connecting railroads receive a line haul, said switching charge being absorbed by said line-haul carriers, and in the case of transportation between Brownsville proper and said properties of the relators herein the charge is $8.10 per car, which is paid by the owner or consignee of the shipment involved.

Said respondent, Port Isabel & Rio Grande Valley Railway, owns certain motive power, which is sufficient for its purposes, one caboose and one water car, but it now owns no serviceable freight equipment whatever and requires no serviceable freight equipment for the discharge of its duties and functions as a purely switching carrier.

Said respondent above named has heretofore indicated to the relator herein, Brownsville Navigation District of Cameron County, Texas, its willingness and, indeed, its desire to be or become a line-haul carrier and receive a division of through rates, but the said relator has at all times vigorously denied the relator's right to be or become such carrier, and it has at various times threatened it with various pains and penalties in the event it should attempt to be or become other than a switching carrier or to demand any other or higher charges than those hereinbefore described.

Said respondent now has pending before the Interstate Commerce Commission and Reconstruction Finance Cor- [fol. 139] poration applications for a certain loan for the purpose of improving its property and is ready and willing and desires to procure a sufficient sum by loan from said Reconstruction Finance Corporation to enable it to buy 50 second-hand box cars, which would enable it, irrespective of any legal obligations on its part and over and above any such obligations, to furnish adequate equipment for switching service between Brownsville, Texas, and Matamoros, Mexico, but the relators herein have objected and are yet objecting to all of the proposed loan aforesaid, including that which the said respondent desires to devote to the purchase of equipment. The ground of such objec-

tions alleged by the relator herein is the proposed construction of a short line of railroad, but nevertheless, the said objection and protest go to the entire proposed loan.

In this connection, the said relator herein, Brownsville Navigation District of Cameron County, Texas, though its own tracks approximately two miles in length serving the Port of Brownsville, has wholly failed to provide any railroad rolling stock or equipment whatsoever for use in connection with said tracks or business originating or terminating thereon.

Further deponent sayeth not.

(Signed) L. S. Bourne.

Sworn To And Subscribed on this the 26th day of January, A. D. 1937. (Signed) O. G. Kehrer, Notary Public in and for Harris County, Texas. (Seal.)

Mr. Reed: We have here two affidavits of Mr. Hofmokel and the affidavits of L. S. Bourne, Leslie C. Fitch, F. A. Lallier, and J. G. Philen, Jr., in response to the affidavits of the respondents on the plea of jurisdiction, and in addi-[fol. 140] tion, by stipulation with counsel, we are relying upon the opinion and order of the Interstate Commerce Commission, Rules For Car-Hire Settlement, Docket 17,801, 160 I. C. C. 369; order issued, 165 I. C. C. 495; reviewed by the Supreme Court of the United States and modified in one particular in 284 U. S. 80.

I wonder if the Court has a copy of this volume of the I. C. C. report?

The Court: Yes, I think it is in the library.

Mr. Reed: It is stipulated between counsel that those may be considered in evidence.

The Court: All right.

Mr. Reed: That is all we have.

(The two affidavits of F. W. Hofmokel and the affidavits of L. S. Bourne, Leslie C. Fitch, and F. A. Lallier, and J. G. Philen, Jr., were then received in evidence, marked "Relators' Exhibit 3", and are as follows:)

RELATORS' EXHIBIT 3

AFFIDAVIT OF F. W. HOFMOKEL

STATE OF TEXAS,
County of Harris.

Before me, the undersigned authority, on this day personally appeared F. W. Hofmokel, who being by me first duly sworn upon his oath deposes and says:

That I am Director of the Port of Brownsville for the Brownsville Navigation District of Cameron County, Texas. I have been engaged in work of this character for eighteen [fol. 141] years. Prior to my connection with the Port of Brownsville, I was employed in the same capacity at the Port of Baton Rouge, Louisiana for seven years. Prior to that time, I was engaged in the steamship business representing the North German Lloyd Steamship Company at New Orleans, Louisiana for three and one-half years. Prior to that time, I was located in the city of New York, New York, and was engaged in the steamship business representing DeClermont-Donner, Ltd., Steamship Agents. I was connected with that concern for three years. Prior to that time, I served four years with the German Shipping and Steamship Company. During all of these employments, I have been actively engaged in the business of arranging for the transshipment of commodities between water carriers and land carriers.

Prior to the opening of the Port of Brownsville, May 16, 1936, I was engaged by the Navigation District of Cameron County, Texas for the purpose of developing a movement of tonnage through this port and for the purpose of arranging for steamship companies to call at the Port of Brownsville in the handling of the commodities to and from Brownsville to foreign countries and in United States coastwise service. I came to Brownsville on June 1, 1936, and have since that time been engaged in studying the possibilities for the movement of traffic through this port. I have investigated extensively the traffic that might move through the Port of Brownsville that originates in Mexico and that terminates in Mexico. I have made several trips into Mexico for the purpose of consulting with shippers and manufacturers in that territory, and for the purpose of obtaining definite commitments and arrangements for the movement of their commerce through the Port of Browns-

ville. I have, in fact, obtained such definite commitments and definite arrangements for the transportation of commodities originating in Mexico and destined to Mexico [fol. 142] through the Port of Brownsville. I have arranged definitely, and know, that if the railroad transportation service is available for its interchange at Brownsville, that we can move through the Port of Brownsville annually the following commodities originating or destined to points in Mexico:

24,000 tons of Kraft paper;
3,600 tons of caustic soda;
60,000 tons of sulphur;
50,000 bales of cotton;
6,000 tons of arsenic;
10,000 tons of scrap iron;
10,000 tons of cottonseed cake;
100,000 tons of lead bullion;
72,000 tons of coke;
100,000 tons of steel billets;
4,000 bales of cotton linters;
12,000 tons of cement;
25,000 tons of zinc concentrate;
25,000 tons of general merchandise traffic;
3,000 automobiles.

I have read the affidavit of T. H. Levy of respondent, The St. Louis, Brownsville & Mexico Railway, Guy A. Thompson, Trustee (hereinafter referred to as the Missouri Pacific) and state that the shippers utilizing the Port of Brownsville are not making any unusual or out of the ordinary demand upon said carriers for equipment. In fact, all commodities that we expect to move through Brownsville have heretofore moved and are now moving through other Texas ports and other Texas gateways between Mexico and the United States; the gateway principally used being that of Laredo, Texas, United States of America and Nuevo Laredo, Tamaulipas, Republic of Mexico and the Port of Corpus Christi. The equipment in which the commodities are moving, have moved in the past and in [fol. 143] which we desire to move them through Brownsville is the equipment that is normally maintained in the territory in and around the gateways of Laredo, Brownsville and the Port of Corpus Christi. It is equipment which the carriers have used in the past to move these commodi-

ties and which they are now using to move them and which we desire to use partially for the purpose of moving some of them through the Port of Brownsville. In all cases in connection with commodities moving through ports, whether it be Brownsville or Corpus Christi, the rail carriers are given advance information of the arrival of steamers and the departure of steamers so that the equipment needs are known for two or three weeks or as much as thirty days for the requirements of the commerce. The nature of the equipment is therefore known and the character of the commodities to be transported is known.

The facts, however, are that the Port of Brownsville is not demanding any more equipment or any other equipment other than that now being used for the transportation of identical commodities. For instance, the Port of Brownsville had booked for movement through that port some 6,000 tons of steel billets originating at Birmingham, Alabama, moving via water to Brownsville and thence via rail to Monterrey, Mexico. Because of the refusal of the Missouri Pacific to provide equipment under its interchange rules and regulations with the Port Isabel & Rio Grande Valley Railway, this movement, while part of it was enroute from Birmingham to Brownsville, was diverted to the port of Corpus Christi. This diversion was accomplished because the Missouri Pacific informed the owners in Monterrey, Mexico that they would not transport the commodity from an interchange in Brownsville with the Port Isabel & Rio Grande Valley Railway (hereinafter referred to as Rio Grande) to the interchange point with the National Railways of Mexico on the international bridge operated by the Brownsville & Matamoros Bridge Company.

[fol. 144] Approximately 3,000 tons of these steel billets were diverted to the Port of Corpus Christi and approximately 1,500 tons of which were transported from that point by the Texas Mexican Railway to Laredo, there delivered to the National Railways of Mexico and transported into Monterrey, Mexico in the following equipment:

Baltimore & Ohio Railway—Nos. 255198, 253770.
Missouri Pacific Railway—Nos. 13200, 71303, 72273.
International & Great Northern Railway—No. 15041.
Texas & Pacific Railway—No. 17640.
Pennsylvania Railway—Nos. 860690; 861252; 810,028, 356,230; 316789; 293614; 301307.

Missouri-Kansas & Texas Railroad—Nos. 41317; 41141.
Elgin, Joliet & Eastern Railway—No. 80965.
Atchison, Topeka & Santa Fe Railway—Nos. 170036; 85135; 53148.
Pittsburg & Lake Erie Railroad—Nos. 45212, 47937.
Chicago, Rock Island & Pacific Railway—Nos. 187835, 187487.
Wichita Falls & Southern Railway—No. 9013.
Boston & Maine Railway—No. 11017.
Chesapeake & Ohio Railway—No. 255776.

These cars were transported by the Texas Mexican Railway Company from Corpus Christi to Laredo and were switched to the center of the international bridge at Laredo and were delivered to the National Railways of Mexico and were all transported loaded by the National Railways of Mexico from that point to Monterrey, Mexico. This same equipment will be returned by the National Railways of Mexico with commodities loaded for transhipment through the American ports. If any of the Commodities are to be transshipped through the Port of Brownsville, the Missouri Pacific will not accept them at the interchange point on [fol. 145] the international bridge and switch them from that point to the interchange with the Rio Grande for the purpose of delivery at the Port of Brownsville. If the same cars are loaded in Mexico with commodities destined to Corpus Christi and transported to Matamoros by the National Railways of Mexico and delivered to the Missouri Pacific at the interchange on the international bridge, the Missouri Pacific will switch them into Brownsville, transport them to Corpus Christi for transshipment by water and they are handling traffic in that manner. If the same equipment is loaded in Mexico and transported from there to Laredo, Texas for transhipment to any port in Texas, it will be switched at that point by the Texas Mexican Railway for the account of the Missouri Pacific as the Missouri Pacific transports commodities from Laredo to Corpus Christi or any other Texas port. The car numbers above given are but illustrative. It is a common practice for the American railway cars to move into Mexico through various gateways for interchange with the National Railways of Mexico and the American railroad cars are transported by the National Railways of Mexico into the interior of Mexico.

That in my investigation of the possibility of moving

commodities through the Port of Brownsville to and from Old Mexico, I found that the American railways are permitting their equipment to move into Mexico under interchange arrangements with the National Railways of Mexico. Particularly is this true in connection with the equipment of the Missouri Pacific and the Southern Pacific railways. This equipment moves through various gateways including Brownsville into Mexico and is frequently returned to the American border empty. If the commodities originating in Mexico are shipped through any gateway, Laredo or Brownsville, through any port other than Brownsville, Corpus Christi or Houston, for instance, the Missouri Pa- [fol. 146] cific will permit this equipment to be loaded in Mexico and transported by the National Railways of Mexico to the border gateway point and will switch that equipment at either Laredo or Brownsville for transportation to Corpus Christi, Houston and other Texas ports. It will not perform the same identical service if the commodity is to be transshipped through the Port of Brownsville.

The statement in the affidavit of Witness Levy "for the past several years our lines, and as far as I know, other American lines, except in times of acute car shortage, have furnished equipment for loading on their own lines with freight consigned to points in Mexico, the sole condition being that the line furnishing the car receives a line haul movement of the freight and consequently a division of the line haul revenue" is incorrect and in error. The foregoing cars, the Texas Mexican Railway obtained a line haul on the traffic that originated at Corpus Christi, Texas but in no case did that carrier own and furnish a single one of the cars. In addition, the equipment is being furnished by the American railways at Laredo, Texas for loading at Laredo and transshipment to Monterrey, Mexico and other points in Mexico. For instance, on Jan. 6th, Missouri Pacific Car No. 72448 was loaded at Laredo, Texas, delivered to the National Railways of Mexico at the international bridge interchange and transported loaded by that carrier to Monterrey, Mexico. No American carrier obtained a line haul on that car. On Jan. 27th, Missouri-Kansas & Texas Car No. 41461 was loaded at Laredo and delivered to the National Railways of Mexico and transported by that carrier to Monterrey, Mexico loaded. No American carrier obtained line haul transportation on that

car. On Feb. 6th, there was loaded at Laredo, Texas, Chicago, Rock Island & Pacific Car No. 187835 and on Feb. 9th, Chicago, Rock Island & Pacific Car No. 187039 was loaded at Laredo, Texas and both cars were delivered to the Na-
[fol. 147] tional Railways of Mexico at the interchange point on the international bridge and both cars were transported by that carrier to Monterrey, Mexico loaded. No American line obtained line haul transportation or revenue on that equipment.

On Feb. 9th, Louisville & Nashville Car No. 54440 was loaded at Laredo, Texas and delivered to the National Railways of Mexico at the international bridge for interchange and transported by that carrier to Monterrey, Mexico loaded. No American railway obtained line haul transportation or revenue out of that loading and that car.

These same cars will be returned by the National Railways of Mexico loaded to some American gateway with commodities to be transshipped through some American port. The Missouri Pacific will not transport them if handled through Matamoros and delivered to the Missouri Pacific at the interchange of the international bridge at Brownsville for transshipment through the Port of Brownsville. The same cars loaded with the same commodities can and will be interchanged through the gateway of Laredo for transportation through any other American port.

The statement in the affidavit of affiant H. Booth that the American railways do not permit their equipment to move into Mexico except when they obtain a line haul and line haul revenue is not correct and is contrary to the facts with respect to the constant interchange of commodities between Mexican and American border points.

The National Railways of Mexico are parties to the per diem agreements and car service rules of the American railways and they are parties to the tariff on file with the Interstate Commerce Commission with respect to the interchanging of equipment at border and gateway points. It is incorrect and inaccurate to state that the National Railways of Mexico are not parties to the per diem and car service rules because it is shown in the official rail-
[fol. 148] way equipment register on file with the Interstate Commerce Commission, I. C. C. No. 243, page 1056 that the National Railways of Mexico are parties to the interchange per diem and car service rules for the purpose of

car hire, car distribution, bills for repairs maintenance of rolling stock, car records, mileage or per diem reports, freight claim accounts, interline accounts and all of the various rules and regulations adopted and prescribed by American railways and approved by the Interstate Commerce Commission for interchange of equipment between carriers.

All of the movements and all of the transportation service desired by shippers using the Port of Brownsville are covered by published rates on file with the Interstate Commerce Commission and are covered by published car service rules and regulations approved and established by the Interstate Commerce Commission. We seek no other distribution of equipment other than that which is required under existing rules and regulations. We seek to use no other rates except those lawfully on file with the Commission. We desire to have assigned to Brownsville and the railroads serving the Port of Brownsville only that equipment which properly may be so assigned under the existing rules and regulations approved and established by the Interstate Commerce Commission in the prescription of the car service rules for car rental as between railroads.

With reference to the affidavit of L. S. Bourne, General Manager of the Port Isabel & Rio Grande Valley Railway, I desire to state that the people of Brownsville have not opposed the loan and application of that carrier for the purpose of obtaining equipment. The application of that carrier to the Reconstruction Finance Corporation and to the Interstate Commerce Commission did not designate any part of the loan to be used for the purpose of buying cars for use in the transportation of commodities over its [fol. 149] line. The loan was requested for the purpose of repaying outstanding bonded indebtedness and for the purpose of constructing a wholly unnecessary new line of railway in the territory. Our main objection to the loan and our reason for protesting it grew out of the fact that it did not state as its purpose the use of the money for the providing of necessary equipment and facilities for the service necessary at the Port of Brownsville.

That carrier has relied upon the car service rules and the car hire rules of the Interstate Commerce Commission for the purpose of hiring equipment from other railroads. Those rules have been prescribed by the Commission for

the express purpose of providing short line railways who do not own equipment with a means of renting equipment from carriers who do own it.

The Missouri Pacific Railway, through its solicitors and representatives in Mexico, have circulated false information with respect to the Port of Brownsville, and have endeavored in that manner to divert the movement of traffic from Brownsville to Corpus Christi, and other ports. An example of this character of solicitation is found in the letter attached hereto and made a part hereof as though fully copied herein, marked Appendix "A." This letter was addressed generally to the shippers and receivers of freight in the vicinity of Monterrey, Nuevo Leon, Mexico. In it the Missouri Pacific falsely stated that the charges for handling at Brownsville to be in excess of the charges made at that point. For instance, it is stated that the switching at Brownsville is $8.91 per 2,000 pounds and $3.47 per 2,000 pounds. As a matter of fact, the switching charges at Brownsville are $8.10 per car of approximately 50 tons, and $3.15 per car of approximately 50 tons. In the same letter, it is stated that the handling charge at Corpus Christi, Texas is 2½c per 2000 pounds. Also, it is stated [fol. 150] that the freight rate from Corpus Christi to Laredo, Texas is 14c per 2,000 pounds, when in fact the charge is 2½c and 14c per 100 pounds.

Particularly does this letter solicit the movement via Corpus Christi as against Brownsville, and asserts that the representatives of the Missouri Pacific in Europe are all cooperating for the purpose of forcing the movement via Corpus Christi by endeavoring to obtain lower steamship rates through Corpus Christi than would be applicable through Brownsville.

The Port of Brownsville will lose, and has lost port charges as a result of the diversion of this tonnage through other gateways approximately $78,000.00 based on its annual expected revenue from the handling of this traffic. In addition, the Port of Brownsville and the community of Brownsville have lost, and will lose, approximately $250,000.00 per annum in the loss of labor charges and other moneys that would accrue to the Port if the traffic in fact moved through the Port of Brownsville instead of other gateways.

The Missouri Pacific Railway has directly and specifically instructed the Rio Grande Valley Railway not to permit the loading of any equipment that may be on its line with commodities for transportation from Port Brownsville to Matamoros. Under date of October 15, 1935, Mr. H. R. Safford, Executive Vice President of the Missouri Pacific Railway at Houston, Texas wired L. S. Bourne, General Manager of the Rio Grande the following telegram:

EXHIBIT

"Reference Mr. Booths letter of 7th furnishing equipment for handling freight through Ports of Brownsville and Port Isabel destined points in Mexico you have offered us today MP 83054 sheet steel from Brownsville Port for Monterrey this car was delivered you in line haul service for unloading at Port Isabel and was loaded at Brownsville [fol. 151] without authority from us. Effective today discontinue loading any of our Missouri Pacific System line cars to points in Mexico unloaded on your line received on either road haul or switch service and return them to us empty under the usual car service rules. Would appreciate your acknowledgment and understanding."

This telegram and the instructions therein contained represents the policy pursued by the Missouri Pacific with respect to the Port of Brownsville.

Commodities loaded in equipment at the Port of Brownsville ready for transportation from the Port of Brownsville to Matamoros have been refused transportation by the Rio Grande and the Missouri Pacific, and they have refused to accept the cars loaded with these commodities for transportation to Matamoros and there to be interchanged with the National Railways of Mexico.

The Port of Brownsville and the shippers endeavoring to use the Port of Brownsville have been requested by the Missouri Pacific and the Rio Grande to unload cars that they already had loaded and ready for transportation to the interchange point on the International Bridge for interchange between the Missouri Pacific and the National Railways of Mexico.

There is available and in the Rio Grande Valley, and particularly in the community of Brownsville, adequate car supply for the transportation of commodities to and from

the Port of Brownsville and Matamoros, Tamaulipas, Mexico.

When the commodities that we ordinarily handle through Brownsville are diverted to the gateway of Laredo, the same identical equipment is required for its transportation as would be required if the commodities were in fact handled through the Port of Brownsville and interchanged at Matamoros, Tamaulipas, Mexico.

[fol. 152] Under date of November 3, 1936, the Missouri Pacific Railway addressed the following instructions to L. S. Bourne, General Manager of the Rio Grande, with respect to all equipment in connection with the transportation of commodities between the Port of Brownsville and Mexico:

EXHIBIT

"A few days ago I advised your Mr. Philen verbally that the Missouri Pacific and Southern Pacific Lines officials had placed instructions prohibiting the Port Isabel and Rio Grande Ry. from loading any freight car equipment delivered it by them with freight destined to points in Mexico.

"This applies to all equipment regardless of ownership and we necessarily will have to adhere to their instructions as we have no jurisdiction over this equipment other than to handle as they direct.

"I understand you are figuring on loading some of the cars we are placing at docks to be unloaded, with commodities destined to points in Mexico.

"It is to be hoped you will not take this action as we cannot accept the cars loaded for points in Mexico without the authority of officials of the lines delivering the cars to us.

"If you can secure such authority from delivering lines we will be very glad to handle in the usual way, otherwise such cars will be held subject to your account as the Missouri Pacific will not accept them from us in interchange.

"Will you kindly acknowledge receipt and understanding of these instructions."

This letter contains the instructions that have resulted in the diversion of the tonnage from the Port of Brownsville to other gateways.

Shippers, owners and consignees of commodities have been frightened away from the Port of Brownsville by the attitude of the carriers, and it is now difficult to obtain the transportation of any commodities through this port for [fol. 153] the reason that the general understanding is that the rail carriers serving this Port will not afford the necessary and required transportation service to move the commodities to and from the Port of Brownsville.

The same geographical situation with respect to Laredo, Texas and Nuevo Laredo, Tamaulipas, Mexico, exists, insofar as the location of the two towns is concerned, as exists at Brownsville, Texas and Matamoros, Tamaulipas, Mexico. In both instances, the American town of Laredo and the Mexican town of Nuevo Laredo, and the American town of Brownsville and the Mexican town of Matamoros, are adjacent to each other, being separated only by the same international boundary, the same Rio Grande River.

Further affiant sayeth not.

(Signed) F. W. Hofmokel.

Sworn to and subscribed before me this 19th day of February, 1937, to certify which witness my hand and seal of office. (Signed) Louise M. Sommerhauser, Notary Public, Harris County, Texas. (Seal.)

APPENDIX "A" TO AFFIDAVIT

Translated Copy

Missouri Pacific Lines
Apartado 201

Monterrey, N. L.

September 10, 1936

Cia. Fund, de f. y A. de Monterrey, S. A., Monterrey, N. L.

Attention Don Agapito Longoria

MY DEAR SIRS:

In reference to verbal and telephonic conversations that I have had with your Mr. Longoria, I take great pleasure [fol. 154[to announce that the following data has been compiled in connection with the projected shipment of coke from Europe.

Charges in Brownsville:

Wharfage per ton of 2,000#	Dis.	0.30
Switching from Brownsville to our Lines per ton of 2,000#	Dis.	8.91
Switching from our Lines to Bridge per ton of 2,000#	Dis.	3.47
Total bridge charges per ton of 1,000 Kilos	Dis.	0.23½

In case this ship is unable to discharge directly into railway cars, there will be a warehouse charge, the amount of which has not been determined by the Port Administrators. Also if the ships that are discharging are not equipped with cranes, there will be an additional charge for handling.

Charges in Corpus Christi:

Wharfage per ton of 2,000#	Dis.	0.25
Handling charge per ton or 2,000#	Dis.	0.2½
Freight rate from Corpus to Laredo per ton of 2,000#	Dis.	0.14
Bridge Toll in Laredo per ton of 1,000 Kilos	Dis.	0.23½

Charges in Houston:

Wharfage per ton of 2,000#	Dis.	0.25
Handling per ton of 2,000#	Dis.	0.2½
Freight rate from Houston to Laredo per 100#	Dis.	0.36

[fol. 155] Referring to the facilities at the Port of Brownsville, please be advised that we will furnish empty railroad cars for said port to the best of our ability, the same conditions existing for the National Railways of Mexico, all of which signifies that upon receipt of a large shipment of coke, it will be impossible to haul the entire shipment, thereby necessitating our leaving part of the cargo to wait until more equipment can be gathered to load it.

AFFIDAVIT OF F. W. HOFMOKEL

STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, on this day personally appeared F. W. Hofmokel, who being first duly sworn upon oath, deposes and says:

Attached hereto and made a part hereof as Exhibit "A" is a correct copy of the tariff of the Port Isabel & Rio Grande Valley Railway Company on file with the Interstate Commerce Commission as Ellington's I. C. C. No. 4. The charge for transportation between the turning basin of Port Brownsville and the intercharge of the St. Louis, Brownsville & Mexico Railway Company is stated as $8.10 per car.

Attached hereto and made a part hereof as Exhibit "B" is a correct copy of Supplement 28 to Gulf Coast Lines Tariff No. 490, J. E. Bailey's I. C. C. No. 30 which is on file with the Intertsate Commerce Commission stating the charge on all freight in carloads between the interchange connection with all lines in Brownsville and the interchange of the St. Louis, Brownsville & Mexico Railway Company with the Brownsville & Matamoros Bridge Company to be $3.15 per car. This charge applies on all freight regardless of the quantity loaded in the car.

Attached hereto and made a part hereof is Exhibit "C". Exhibit "C" is a correct copy of the tariff of the Brownsville & Matamoros Bridge Company for the transportation [fol. 156] of commodities across the international bridge. The St. Louis, Brownsville & Mexico Railway Company, Guy A. Thompson, Trustee, concur in this tariff with the Brownsville & Matamoros Bridge Company. The charges stated in this tariff represent the charges made by the bridge company for the use of the bridge for the movement of commodities between Brownsville and Matamoros. The total charge stated between the interchange with the Brownsville and Matamoros Bridge Company and the turning basin at the Port of Brownsville is $11.15 per car.

All of these tariffs are on file with the Interstate Commerce Commission.

Further affiant sayeth not.

(Signed) F. W. Hofmokel.

Subscribed and sworn to before me this 19 day of February, 1937 to certify which witness my hand and seal of office. (Signed) Hazell Miller, Notary Public, Harris County, Texas.

(A photostatic copy of Exhibit A will be found at side folio 125 of this record. Photostatic copies of Exhibits B and C are as follows:)

EXHIBIT "B" TO AFFIDAVIT

APPLICATION OF TARIFF OF EMERGENCY CHARGES

Except as otherwise provided herein, charges resulting from the rates in this Supplement are subject to Tariff of Emergency Charges, as provided in Supplement No. 24 (or successive issues thereof.)

Supplement No. 28 to R. C. T. No. 74

Cancels Supplement No. 27
Supplements Nos. 24, 28, E, G, H and J contain all changes from the original Tariff that are effective on the date hereof.

Supplement No. 28 to I. C. C. No. 30

Cancels Supplement No. 27
Supplements Nos. 24 and 28 contain all changes from the original Tariff that are effective on the date hereof.

GULF COAST LINES

FREIGHT TARIFF OF

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY

(Guy A. Thompson, Trustee)

in connection with

HOUSTON BELT & TERMINAL RAILWAY COMPANY (FX-4 NO. 2)
INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY (FX-4, NO. 87)
(Guy A. Thompson, Trustee)
THE ORANGE & NORTHWESTERN RAILROAD COMPANY (FX-4, NO. 99)
RIO GRANDE CITY RAILWAY COMPANY (FX-4, NO. 1)
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY (FX-4, NO. 41)
(Guy A. Thompson, Trustee)
SAN BENITO AND RIO GRANDE VALLEY RAILWAY COMPANY (FX-4, NO. 1)

SUPPLEMENT NO. 28
Cancels Supplement No. 27
Supplements Nos. 24, 28, 4E, 4G, 4H and 4J contain all changes

to

TERMINAL CHARGES TARIFF NO. 496

Publishing

RATES, RULES AND REGULATIONS

Governing

SWITCHING, DRAYAGE, HANDLING AND TRANSFER CHARGES

also

Damage Charges,
Mileage on Private Car Equipment,
Order Notify Shipments,

Stop-over Privileges on Cars in Transit,
Transportation of Empty Bank, Manure,
Poultry and Cattle Car Equipment.

and

OTHER TERMINAL CHARGES

APPLICABLE AT STATIONS SHOWN IN ITEM NO. 15

on the

Beaumont, Sour Lake & Western Railway.
Orange & Northwestern Railroad.
San Benito and Rio Grande Valley Railway.
Rio Grande City Railway Company.
St. Louis, Brownsville and Mexico Railway.

* Denotes Intrastate Application only.
(D) Applicable only in connection with paragraph (c) of Item No. 187, or reissues.
(R) REISSUED from Supplement No. 10, effective July 20, 1931.

ISSUED APRIL 29, 1936.

EFFECTIVE JUNE 1, 1936,
(Except as otherwise provided herein.)

Issued by
J. E. BAILEY,
General Freight Agent,
Room 402, Union Station,
HOUSTON, TEXAS.

File 1-148, 16-148, 79-148, 4-260,
1-1977, I.& S. 3617.
Case 29.

Planographed by John S. Swift Co., Inc., St. Louis, Chicago, New York (500-Authy. 3758)
(Printed in U. S. A.)

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Supplement No. 28 to Terminal Charges Tariff No. 490.

EXPLANATION OF ABBREVIATIONS

Refer to explanation of abbreviations shown on Page 3 of Tariff and make the following addition:

ABBREVIATION	EXPLANATION
P.I.& R.G.V.	Port Isabel and Rio Grande Valley Railway.

(2) Item No. 20-A, Cancels No. 20.

NON-COMPETITIVE POINTS
(Applicable on Interstate Traffic Only)

The term non-competitive points, as used in this Tariff, is defined as follows:

Points reached only by the rails of the N.I.& N.; N.O.T.& M.; B.S.L.& W.; O.& N.W., and points reached by the rails of railroads having track connection with N.I.& N.; N.O.T.& M.; B.S.L.& W., and O.& N.W. only, except Blanks, La., Call, Texla and Wiergate, Texas. (See Item No. 25, or reissues.) (File 1-260)

(2) Item No. 25-B, Cancels No. 25-A.

COMPETITIVE POINTS
(Applicable on Interstate Traffic Only)

The term "competitive points" as used in this Tariff, is defined as follows:

Points not included in Item No. 20, but including Blanks, La., Call, Texla and Wiergate, Texas, also points of origin included in Item No. 20 to points of destination on these lines where the traffic can also be handled from such points of origin or to such points of destination via lines other than these lines.

(2) Item No. 32.

FREE TIME TO ACCUMULATE CARLOAD SHIPMENTS OF COFFEE

On shipments of Coffee, when handled direct from shipside to depot of these lines, not exceeding fifteen (15) days' free time will be allowed, from date the initial part of the shipment is delivered these lines, to complete the entire lot as shown on the shipping ticket. Part of the incomplete lots, constituting carloads, will be forwarded to destination at discretion of these lines. (File 1-276-12)

(4) Item No. 70-A, Cancels No. 70.

RENTAL DOUD STOCK CAR COMPANY CARS

Cancel. Obsolete. Company out of business.

(4) Item No. 75-A, Cancels No. 75.

RENTAL MATHER STOCK CAR COMPANY CARS

Cancel. Obsolete. No special charge applicable.

(4) Item No. 80-A, Cancels No. 80.

RENTAL VENICE TRANSPORTATION COMPANY CARS

Cancel. Obsolete. Company out of business.

(1)(2) Item No. 85-C, Cancels No. 85-B.

RENTAL OF ARMS-YAGER RAILWAY CAR COMPANY

Cancel. Charges published by Arms-Yager Railway Car Company in their Tariff No. (2) 18, or reissues, will apply.

(4) Item No. 90-A, Cancels No. 90.

RENTAL OF LEMAC CARRIERS POULTRY CARS

Cancel. Obsolete. Company out of business.

(2) Item No. 95-B, Cancels Nos. 95 and 95-A.

(Applicable on Interstate Traffic only)

MINIMUM CARLOAD WEIGHT ON FREIGHT SHIPPED IN CARS OF GREATER OR LESS CAPACITY THAN ORDERED BY SHIPPERS, OR IN NEW, REBUILT OR DEFECTIVE CARS

(1) FREIGHT SHIPPED IN LARGER CARS THAN ORDERED

1. (a) When a car of certain dimensions or capacity is ordered by a shipper, and Agents of these companies are unable to furnish a car of the size ordered, a larger car may be furnished and used, and the carload minimum weight applicable upon the size of the car ordered will be applied (provided the shipment could have been loaded into or upon car of the capacity or size ordered).

(b) In cases where a car of greater length is furnished at these companies' convenience, the rules of the current tariffs or classifications providing for increased weights on cars of extra length will not govern.

(c) The waybill and bill of lading for such shipments, where short car minimum weight is applied must bear notation that the short car was ordered but could not be furnished, and that the freight shipped could actually have been loaded in a car of the size ordered by the shipper, giving capacity of the car ordered, with date of order, and the number, initials and capacity of the car furnished.

(d) These instructions must not be construed as authorizing collection of freight charges at the minimum weight of the car ordered, when actual weight is greater, and must in no way interfere with instructions for weighing carload shipments to ascertain correct weights.

(1) FREIGHT SHIPPED IN SMALLER CARS THAN ORDERED

2. (a) When a shipper orders a car of greater dimensions or capacity than can be furnished by these companies, a smaller car may be furnished and used, and freight charges collected on basis of actual weight when the car is loaded to its visible capacity. If the smaller car is inadequate to handle the shipments, two smaller cars may be furnished and used, and freight charges collected on basis of minimum weight provided for in cars of size ordered; all freight in excess of the minimum weight to be charged for on basis of the carload rate.

(b) The waybill and bill of lading must show the capacity of the car ordered, with date or order and the number, initials and capacity of the car or cars furnished.

(Concluded on following page)

(1) Applicable only in connection with shipments of Furniture, Iron and Steel Containers, Iron and Steel Tanks and Fibreboard and Pulpboard Boxes.

For explanation of other reference marks, see page 3.

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9 Item No. 95-B, Cancels Nos. 95 and 95-A--Concluded.

FREIGHT SHIPPED IN NEW, REBUILT OR DEFECTIVE CARS

3. Freight loaded in new or rebuilt cars making initial trips, or in defective cars which cannot be safely loaded to the minimum weight provided in tariffs or classifications, will be subject to the minimum weight provided in tariffs or classifications but not to exceed 40,000 pounds. (Will not apply on shipments of Forest Products nor on refrigerator or insulated cars.)

19 Item No. 105-C, Cancels No. 105-B.

PAYMENT OF TOLLS ON TELEGRAMS AND ON TELEPHONE CONVERSATIONS
(See Exceptions) (R.W. 1261)

Tolls on messages by telegraph, telephone, cable or radio signed by, or sent for account of, shippers, consignees or their agents or representatives relative to routing or other railroad service in connection with shipments of freight, will not be assumed by the carriers, excepting that when such toll is upon a collect answer to telegraph or telephone messages initiated by the carriers, relating to the traffic of the shipper or consignee, same may be assumed by the carriers.

EXCEPTIONS

These lines will transmit over their respective telegraph lines, free of cost, such telegraph instructions from shippers to messengers in charge of carload shipments of Tropical Fruits, that may be necessary in the routing, cars or delivery of such shipments, the messages to be transmitted from and to carriers' representatives to carry out shippers' instructions.

26A Item No. 125-B, Cancels No. 125 and 125-A.

FURNISHING DOOR BOARDS ON CARLOAD SHIPMENTS OF BULK FREIGHT

Suitable door boards will be furnished free of charge at all loading stations for use in Scoopering cars for carload shipments of any bulk freight requiring such protection. Such material will be considered as a part of the car, and no charge will be made for transporting same. If supply of door boards at any station should run short, the local agent should secure authority from the operating department to purchase the necessary lumber until supply of door boards is replenished. (See Exception.)

③ EXCEPTION--These rules will not apply on Grain, Grain Products, Seeds and other articles taking same rates, named in Western Trunk Lines' Tariff No. 330, Agent L.E. Kipp's I.C.C. No. A-2579. For rules, see Item No. 70 of that tariff.

6 Item No. 127.

BULKHEADING OF CARS OF FLAXSEED, GRAIN OR MILLET SEED
(Rate Notice No. 29662)

Where bulkheads or partitions are used to separate a carload shipment of one or more kinds of grades of bulk Grain or carload shipment of one or more kinds of bulk Grain and Flaxseed or Millet Seed, or both, from one consignor to one consignee, such shipment will be transported at owner's risk of mixing. In such cases a charge of $5.00 per car in addition to the rates applicable will be assessed for permitting the installation of such bulkheads or partitions. The installation, removal and cost of material of such bulkheads or partitions must be done by and at the expense of the owner or shipper.

27 Item No. 155-C, Cancels No. 155-B.

ABSORPTION OF SWITCHING CHARGES OF CONNECTING LINES AT JUNCTION POINTS IN TEXAS
(Applicable on Interstate Traffic only. For Intrastate Absorptions, see Item No. 290 of Tariff, as amended.)

(a) On carload competitive traffic (see Item No.25-B of Tariff), these lines will absorb connecting lines' switching charges as published and lawfully on file with the Interstate Commerce Commission, only as provided in Items Nos. 155-2 to 155-14, inclusive. (File 79-148-7)

(b) On non-competitive traffic (see Item No.20-A of Tariff), except as provided in paragraph (c), the switching charges as lawfully on file with the Interstate Commerce Commission will be in addition to the rate.

(c) On carload shipments of Lumber and articles taking same rates, except as otherwise provided, originating at non-competitive points where the rate is 15 cents per 100 pounds or higher, these lines will absorb the switching charges of connecting lines necessary to effect delivery at destination, only as provided in Items Nos. 155-2 to 155-14, inclusive. (File 79-148-7).

(d) } Cancelled. Provisions published in Item No. 163 will apply.
(e) }

ABSORPTIONS IN DOLLARS AND CENTS PER CARS

Item No.	AT	ON ALL CARLOAD TRAFFIC		MAXIMUM AMOUNT OF ABSORPTION (See Item No.155-C, as reissued).
		BETWEEN	AND	
		Interchange Connection on	Industries Located on	
27 155-2	Bay City. . . . . .Texas	St.L.B.& M.	G.C.& S.F.	$5.00
			T.& N.O.	⑦ $8.45

② Not filed with the Interstate Commerce Commission.
③ Applicable only on Interstate traffic.
⑦ Includes intermediate switching charge of $3.15 per car assessed by G.C.& S.F.
2 REISSUED from Supplement No. 2, effective April 14, 1930.
4 REISSUED from Supplement No. 4, effective May 25, 1930.
6 REISSUED from Supplement No. 6, effective July 24, 1930.
9 REISSUED from Supplement No. 9, effective May 1, 1931.
15 REISSUED from Supplement No. 15, effective June 25, 1932.
19 REISSUED from Supplement No. 19, effective August 1, 1933.
26 REISSUED from Supplement No. 26, effective August 1, 1935.
26A REISSUED from Supplement No. 26, effective July 1, 1935.
27 REISSUED from Supplement No. 27, effective September 16, 1935.

ABSORPTIONS IN DOLLARS AND CENTS PER CARS				
Item No.	AT	ON ALL CARLOAD TRAFFIC		MAXIMUM AMOUNT OF ABSORPTION (See Item No.155-Q or reissues).
		BETWEEN	AND	
		Interchange Connection of	Industries Located on	
[27] 155-4	Beaumont. . . . . .Texas	B.S.L.& W.	G.C.& S.F. . . . . K.C.S. . . . . T.& N.O.	$5.50
[27] 155-6	Brownsville . . . . . .Texas	St.L.B.& M.	T.& N.O.	$5.50
Δ155-7	Effective June 1, 1936. Brownsville . . . . . .Texas (File 79-148-S)	St.L.B.& M.	P.I.& R.G.V. Aransas Compress Co..	$2.25
			P.I.& R.G.V. East of Mile Post 5.5	$6.30
[27] 155-8	Corpus Christi. . . . . .Texas	St.L.B.& M.	S.A.U.& G. . . . . T.& N.O. . . . . Tex. Mex.	$5.50
[27] 155-10	Houston . . . . . .Texas (See also Item No. 163)	B.S.L.& W. . . . . or St.L.B.& M.	Burlington-Rock Island. . . . . G.C.& S.F. . . . . I.-G.N. . . . . M.-K.-T. of T. . . . T.& N.O.	$8.10
[27] 155-12	Orange. . . . . .Texas	O.& N.W.	T.& N.O.	$5.50
[27] 155-14	All junction points on these lines except those named in Items Nos. 155-2 to 155-12, inclusive.	B.S.L.& W. . . . . O.& N.W. . . . . St.L.B.& M. . . . . or S.B.& R.G.V.	Connecting Lines . .	$5.50

REISSUED from Supplement No. 27, effective September 16, 1935, except as noted.
Item No. 163.

APPLICATION OF HOUSTON, TEX., RATES TO CLINTON, PASADENA, TEX., ETC.

(a) On all carload traffic originating or destined to the following points: Hoffman Oil & Refining Co. Switch, Texas; Clinton, Texas; Fidelity, Texas; Galena, Texas; Pasadena, Texas; Sinco, Texas; these lines will protect Houston, Texas, (1) export, import or coastwise rates published and lawfully on file with the Interstate Commerce Commission and absorb switching charge of $8.10 per car as published in T.& N.O. Ry. Co.'s I.C.C. No. Tex-49, supplements thereto or reissues thereof. (File 1-148).

(b) On all carload traffic originating or destined to points on the Port Terminal Railroad Association of Houston, Texas (as named in Texas Lines' Tariff No. 51-A, Agent H.B.Cummins' I.C.C. No. 341 (B.S.L.& W. No. 773-A), or reissues), these lines will protect Houston, Texas, domestic interstate, export or import rates published and lawfully on file with the Interstate Commerce Commission. (File 105-78)

[15] Item No. 167.

SWITCHING OF LESS CARLOAD SHIPMENTS

(a) These lines will switch, at the rates contained in this Tariff, freight subject to less than carload or any quantity rates, the aggregate weight of which is 6,000 pounds or more, on Interstate or Interstate and Intrastate traffic, from one or more shippers to one or more consignees, received for shipment or to be delivered at the same warehouse or industry.

(b) No extra charge will be made for switching between yards or warehouses and industries on these lines of freight subject to less than carload or any quantity rates the aggregate weight of which is 6,000 pounds or more, on Interstate or Interstate and Intrastate traffic, from one or more shippers to one or more consignees, received for shipment or to be delivered at the same warehouses or industry, which is forwarded or received in road-haul service.

(c) These lines will absorb the lawful terminal switching charges of connecting lines at origin and/or destination, published in tariffs filed with the Interstate Commerce Commission, between yards or warehouses on these lines and industries on connecting lines of freight subject to less than carload or any quantity rates, the aggregate weight of which is 6,000 pounds or more, on Interstate or Interstate and Intrastate traffic, from one or more shippers to one or more consignees, received or to be delivered at the same warehouse or industry, which is forwarded or received in road-haul service.

(d) In lieu of performing switching service under paragraphs (a),(b) and (c) hereof, and/or absorbing the switching charges of connecting lines, as published in paragraph (c) hereof, these lines, at its option, will perform the service equivalent to switching by motor-vehicle transport or by drayage, at its expense, provided no payment is made to shipper or consignee for motor vehicle or drayage service involved.

(e) The provisions of paragraph (d) will also apply on shipments aggregating 6,000 pounds or more, received or to be delivered at the same warehouse or industry, at Houston, Texas, when line haul service is to be or has been performed jointly by the International-Great Northern Railroad and the Beaumont,Sour Lake & Western Railway and/or The St.Louis, Brownsville and Mexico Railway. (File 6-481)

Δ Indicates reduction.
(1) Reference to domestic Interstate rates cancelled. REISSUED from Supplement No. 3, effective May 15, 1930.
[15] REISSUED from Supplement No. 15, effective June 28, 1932.
[27] REISSUED from Supplement No. 27, effective September 16, 1935.

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22 Item No. 195-A, Cancels No. 195.

SWITCHING CHARGES OF CONNECTING LINES AT JUNCTION POINTS

Cancel. Other charges provided in this Tariff will apply.

SWITCHING AT POINTS ON B.S.L.& W. , O.& N.W. R.R., R.G.C. RY., ST.L.B.& M. RY., AND S.B.& R.G.V. RY.

Applicable on Interstate traffic. For switching charges on Texas Intrastate traffic, see Items Nos. 280 to 290, or reissues thereof.

Item No.	Switching At	On	From or To Interchange Connection with	To and From Industries and Warehouses Located On	Switching Rate Per Car
21A 210-A Cancels 210	Beaumont. . . . . Texas (File 4-260-7)	All Carload Freight	T.& P.S. Ry. . . . . T.& N.O. R.R., direct. . G.C.& S.F. Ry.,direct. .	B.S.L.& W. Ry.	$5.50
21 212-A Cancels 212	Houston . . . . . Texas (File 1-148-13)		Connecting Lines	B.S.L.& W. Ry. . . . . St.L.B.& M. Ry.	$8.10
22 220-A Cancels 220	Besamay . . . . . Texas		G.C.& S.F. Ry.,direct. .	O.& N.W. R.R.	$5.50
22 225-A Cancels 225	Orange. . . . . Texas		T.& N.O. R.R., direct. .	Municipal Docks. . . . . O.& N.W. R.R.	$5.50
21A 228	Bay City. . . . . Texas (File 4-260-7)		T.& N.O. R.R.. . . . . G.C.& S.F. Ry.	St.L.B.& M. Ry.	$5.50
22 230-B Cancels 230-A	All junction points on B.S.L.& W., O.& N.W., St. L.B.& M. and S.B.& R.G.V. Railroads, except as shown in Items Nos. 210 to 235 of Tariff, as amended.		Connecting Lines	B.S.L.& W., O.& N.W., St.L.B.& M., or S.B.& R.G.V.	$5.50

SWITCHING AT BROWNSVILLE, TEXAS

Item No.	COMMODITY	BETWEEN	AND	Switching Rate Per Car
23 240-D Cancels 240-C	All carload Freight, except as otherwise shown To or From Points in Mexico. (File 79-148-13)	(a) St.L.B.& M. Ry. team tracks or industry tracks within Brownsville switching limits, including Harrison Street team track, Fourteenth Street team track and Freddo team track.	Interchange of the St.L.B.& M. Ry. with the Brownsville & Matamoros Bridge Co. (Rate includes movement of car one way only.)	$6.30 (See Note 1)
		(b) Interchange connection with other lines.	Interchange of the St.L.B.& M. Ry. with the Brownsville & Matamoros Bridge Co.	$3.15 (See Note 2)
		(c) Fumigating plant at Brownsville, Texas.	Interchange connection of the St.L.B.& M. Ry. with the Brownsville & Matamoros Bridge Co. on shipments originating in Mexico. (Includes movement of car in both directions.)	$3.60 (See Note 3)
		(d) Carload traffic to or from Mexico upon which the St.L.B.& M. Ry. secures a line haul, may be transferred (by consignees, or shippers, or their agents and at their expenses) in St.L.B.& M. Ry. yards at Brownsville, Texas, to or from cars in Mexican service without any additional charge for switching service involved in such transfer.		
		NOTE 1--Carload shipments received from the National Railways of Mexico for team track or industry track delivery on the St.L.B.& M. Ry. at Brownsville, Texas, will be subject to a charge of $6.30 per car for the initial movement; for each subsequent movement on Brownsville Terminal of St.L.B.& M. Ry. or to interchange connection with other lines, a separate charge of $6.10 per car will be made. NOTE 2--On cars handled through the fumigating plant, the charge of $3.60 per car provided in paragraph (c) of this Item will be in addition. NOTE 3--Charge provided in paragraph (c) will not be absorbed.		

21 REISSUED from Supplement No. 21, effective January 7, 1935.
21A REISSUED from Supplement No. 21, effective December 15, 1934.
22 REISSUED from Supplement No. 22, effective January 15, 1935.
23 REISSUED from Supplement No. 23, effective February 27, 1935.

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[20] Item No. 246.

FURNISHING REFRIGERATOR CARS AT BROWNSVILLE, TEXAS

Refrigerator cars, if supplied by these lines for the purpose of loading at Matamoros, Mexico, with freight for delivery within the Brownsville switching limits, will be subject to a charge of $5.00 per car in addition to switching charges assessed under other provisions of this Tariff. (File 16-148-13)

Effective June 1, 1936.
&Item No. 247.

SWITCHING AT BROWNSVILLE, TEXAS

On all carload freight moving between team tracks on the St.L.B.& M., on the one hand and points on the P.I.& R.G.V., on the other hand, within the switching limits of Brownsville, Texas, where no line haul is involved, the St.L.B.& M., will assess a charge of $7.50 per car between the team tracks on the St.L.B.& M. and interchange connection of the P.I.& R.G.V. (File 79-148-5)

[3] Item No. 252.

SWITCHING OF RAILROAD EQUIPMENT
(Applies in Connection with Shipments Receiving Road Haul)
(R.C.T. Circular No. 8261 of March 31, 1930)

(a) When any of the following equipment on its own wheels (cabooses, empty; express cars, empty or loaded and dead locomotives) is switched for account of other lines, the charges will be $6.30, except on dead locomotives the charge will be $12.00. (See Note)

(Applies Only on Intra-Plant, Intra-Terminal or Inter-Terminal Switching)

(b) When any of the following equipment on its own wheels (cabooses, empty; express cars, empty or loaded and dead locomotives) is switched for account of other lines the charge will be $8.10 each, except on dead locomotives the charge will be $15.50 each. (See Note)

NOTE--The above charges apply to one-way movements, except when express cars are loaded in one direction and empty in the other the charge shall apply to the round trip movement. When express cars, empty or loaded, are handled for account of express companies, no charge will be made for switching to or from industries located on switching line's track or for switching to or from connections with other lines, provided the switching line performs the road haul. If the switching line does not perform road haul such service will be charged for as per paragraphs (a) or (b) above.

[2] Item No. 266-A, Cancels No. 265.

SWITCHING AT CALL, TEXAS
(Applicable on Interstate and Intrastate Traffic)
Rates in Dollars and Cents Per Car

COMMODITY	FROM	TO	RATE
Lumber, carloads . . .	Call. . . . . .Texas	O.& N.W. R.R. Co. connections, G.C.& S.F. Ry. Co.	$1.50 (See Note)

NOTE--On carload shipments of Lumber delivered to O.& N.W. R.R. Co. through the Kirby Tram on which line haul will be performed, the O.& N.W. R.R. Co. will pay to the Kirby Lumber Company $1.50 per car to cover switching. No charge will be made for handling empty cars in opposite direction. This amount includes any charge made by the G.C.& S.F. Ry. Co. covering trackage rights. (C.F.-202-25)
No per diem reclaim will be allowed the G.C.& S.F. Ry. Co. or Kirby Lumber Company on this switching. (File 4-260)

[R] Item No. 272.

SWITCHING TO OR FROM ORANGE TERMINAL ASSOCIATION, ORANGE, TEXAS
(File 76-148)
(Applicable only on Interstate Traffic)

A charge of $8.10 per car (see Note) on all classes and commodities loaded by and at the expense of the shipper, and unloaded by and at the expense of the consignee, between industries and team tracks on the Orange & Northeastern Railroad Company within the established switching limits of Orange, Texas, on the one hand, and points on the facilities operated by the Orange Terminal Association at Orange, Texas, on the other hand.

NOTE--The rate of $8.10 per car is a net charge for the switching service described and does not include any terminal or other charges as provided for in Texas Lines' Tariff No. 21-K, Agent A.C.Fonda's I.C.C. No. 284, or reissues, or in individual issues of carriers on file with the Interstate Commerce Commission.

REISSUED from Supplement No. 16, effective October 26, 1932, on Interstate Traffic.
REISSUED from Supplement No. 16, effective September 15, 1932, in Supplement H, on Intrastate Traffic.
Item No. 302-B, Cancels No. 302-A.

SWITCHING LIMITS HOUSTON, TEXAS, OF B.S.L.& W. AND ST.L.B.& M.

Switching limits in Houston, Texas, will be as defined in Houston Belt & Terminal Railway Company (Operating terminal facilities for account of The Beaumont, Sour Lake & Western Railway and The St.Louis, Brownsville and Mexico Railway) Switching Tariff No. 1-W, I.C.C. No. 43, R.C.T. No. 13, supplements thereto or reissues thereof. Also will include points on the tracks operated as the Port Terminal Railroad Association (which trackage is, by virtue of contract with the Harris County Houston Ship Channel Navigation District Board, a part of The Beaumont, Sour Lake & Western Railway Company and The St.Louis, Brownsville and Mexico Railway Company's facilities), said limits extending on the north side of the Ship Channel to the Carnegie Steel Plant and Jones Ship Yard, including the Texas Company (Galena Refinery) and the Haden Lime Company, also the American Petroleum Company (industry tracks owned by the American Petroleum Company at Norsworthy, viz.: Track No. 1 length 5,442 feet from connection with the Port Terminal Railroad Association and Track No. 2 length 952 feet and Track No. 3 length 877 feet, diverging from Track No. 1) and on the south side of the Ship Channel to the Shell Petroleum Corporation Plant, including points west thereof on the tracks operated by the Port Terminal Railroad Association. For list of the industries located on such tracks see Texas Lines' Tariff No. 51-Z, Agent A.C.Fonda's I.C.C. No. 327, or reissues. (File 1-148)

& Indicates reduction.
[2] REISSUED from Supplement No. 2, effective April 14, 1930.
[5] REISSUED from Supplement No. 5, effective June 25, 1930.
[6] REISSUED from Supplement No. 6, effective July 24, 1930.
[20] REISSUED from Supplement No. 20, effective October 20, 1933.

SWITCHING LIMITS OF THE STATIONS SHOWN BELOW ARE AS FOLLOWS:
SWITCHING LIMITS

Item No.	STATION AND ROAD	Points From Which Mile Post Location Shown Herein is Computed	FROM MILE POST DIRECTION	TO MILE POST DIRECTION
[4] 315-A-Cancels 315	O.& N.W. Orange. . . . . .Texas (See Note)	Brownsville. . . Texas	Switching limits extend to.	C-488.00 on East.
NOTE--Switching limits also include points on the trackage operated as the Orange Terminal Association, which trackage is by virtue of an agreement between the interested carriers and the City of Orange, Texas, a part of the said Orange & Northwestern Railroad facilities. (Certificate of Public Convenience and Necessity, I.C.C. Finance Docket No. 7988 of February 26, 1930.) (File 334-106)				
[13] 317	ST.L.B.& M. Bay City. . . . . .Texas	Brownsville. . . Texas	284.8 on north	283.3 on south.
[18] 333	ST.L.B.& M. Gretna. . . . . .Texas	Brownsville. . . Texas	194.3 on north	192.9 on south.
[13] 390	S.B. & R.G.V. Wents . . . . . .Texas	San Benito . . . Texas	20.0 on east	21.3 on west.

[4] REISSUED from Supplement No. 4, effective May 25, 1930.
[13] REISSUED from Supplement No. 13, effective November 12, 1931.
[18] REISSUED from Supplement No. 18, effective June 28, 1933.

EXHIBIT "C" TO AFFIDAVIT

No Supplement to this Tariff will be issued except for the purpose of cancelling the Tariff unless otherwise specifically authorized by the Commission.

I. C. C. NO. 13

Cancels I.C.C. No. 12

GULF COAST LINES

BROWNSVILLE & MATAMOROS BRIDGE COMPANY

in connection with

The St. Louis, Brownsville and Mexico Railway Company
(FW-5, No. 17)
(L. V. Baldwin and Guy A. Thompson, Trustees)

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JOINT BRIDGE CHARGES TARIFF NO. 1178-L
Cancels Tariff No. 1178-K

Showing

BRIDGE CHARGES

between

BROWNSVILLE, TEXAS

and

MATAMOROS, (TAMAULIPAS) MEXICO

- - - - - - - - - - - - - - - - - - -

Bridge Charg Tariff No. 117B-L.

Item No. 1. APPLICATION

The rates herein apply between Brownsville, Texas, and Matamoros, (Tamaulipas), Mexico, as follows:

(a) The rates named in Item No. 2 apply only on traffic originating at or destined Matamoros, Mexico and Brownsville, Texas, proper.

(b) The rates named in Items Nos. 3,4 and 5 apply only on traffic [illegible] by rail to or from points beyond Matamoros, Mexico and Browns[illegible]

ALL TRAFFIC

(Applicable only as Per Paragraph "a" of Item No. 1)

Rates in Cents (United States Currency) Per 1,000 Kilos (2,204.6 [illegible]

COMMODITIES	Rate 1	Rate 2
Railroad shipments (except as noted), minimum weight 35,000 pounds (15,000 kilos)	55½	111
Less than carload shipments	111	222
Railway equipment and supplies, property of National Railways of Mexico or Railroads party to this tariff	12	12
Locomotives, on own wheels, property of National Railways of Mexico or railroads party to this tariff, each	139	139
Coaches and cars, on own wheels, property of National Railways of Mexico or Railroads party to this tariff, each	69½	69½
[illegible]	[illegible]	[illegible]

The minimum charge between Brownsville, Texas and Matamoros, Mexico, to be 28 cents (United States Currency) for each shipment.

Item No. 3. BRIDGE TOLLS ON COMMODITIES OF ALL KINDS

(Applicable only as Per Paragraph "b" of Item No. 1)

(Except those shown in Items Nos. 4 and 5; see Note 1)

Rates in Cents (United States Currency) per 1,000 Kilos (2,204.6 lbs.)

CLASSES

1	2	3	4	5	6	7	8	9	10	11	12
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

The minimum charge between Brownsville, Texas, and Matamoros, ex., to be 28 cents (United States Currency) for each shipment.

Item No. 4 RAILWAY EQUIPMENT ON OWN WHEELS (see note 1.)

(Applicable only as Per Paragraph "b" of Item No. 1.)

Rates in Dollars and Cents (United States Currency)

Locomotives	$ 2.78
Passenger Coaches and Freight Cars	1.39

Item No. 5 [illegible] PER 1,000 KILOGRAMS, CARLOADS. (see note 1)

(Applicable only as Per Paragraph "b" of Item No. 1)

COMMODITIES	RATE (In cents U. S. Currency)
Minerals, Concentrates, and Metals, in bars of ingots, min. weight, in cars of marked capacity greater than 35,000 kilos gross, 90% of capacity, but not less than 30,000 kilograms. In cars of marked capacity under 35,000 kilograms, marked capacity of car	6½
Coal	21
Scrap Iron	(1)

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[fol. 166] AFFIDAVIT OF L. S. BOURNE

STATE OF TEXAS,
County of Cameron:

Before me, the undersigned authority, on this day personally appeared L. S. Bourne, who being by me first duly sworn upon his oath deposes and says:

That I am General Manager of the Port Isabel & Rio Grande Valley Railway, with headquarters at Brownsville, Texas. I am in charge of the operation of that railway. I have been in charge of it since 1925. I am familiar with the transportation of commodities to and from the Port of Brownsville. That port was opened for the movement of commerce about May 15, 1936. The Port itself receives and discharges freight through the turning basin which is approximately seven miles from Brownsville. At the turning basin, the facilities of the Port for loading and unloading traffic are located. The Port Isabel & Rio Grande Railway, hereinafter referred to as "Rio Grande," serves the turning basin. The Rio Grande constructed a connection from its main line with the turning basin, and operates switch tracks and switching facilities from its main line to the turning basin, over which it operates its equipment for the purpose of moving cars to and from the turning basin. The Rio Grande operates between Port Isabel and Brownsville. At Brownsville it has a physical connection for the interchange of traffic with the St. Louis, Brownsville & Mexico Railway Company and the Texas & New Orleans Railroad Company.

Since I have been General Manager of the Rio Grande, the St. Louis, Brownsville & Mexico Railway Company, hereinafter referred to as the "Missouri Pacific," and the Texas & New Orleans Railroad Company, hereinafter referred to as the "Southern Pacific," have interchanged traffic with the Rio Grande at Brownsville. The Missouri Pacific and the Southern Pacific have furnished empty cars and equip-
[fol. 167] ment to the Rio Grande for the purpose of being transported by the Rio Grande to all points on its line for the loading of outbound commodities.

After they were loaded on our line, they were moved by us to the interchange at Brownsville and delivered to the Missouri Pacific and the Southern Pacific, as the case

might be, by placing the loaded cars on the interchange at Brownsville. In connection with loaded cars moving to points on the Rio Grande, we would receive the loaded cars from either the Missouri Pacific or the Southern Pacific at Brownsville and transport them to their destination on our line of railway. Heretofore, loaded cars delivered to us at Brownsville for transportation to points on the Rio Grande, after being unloaded the cars that were made empty were available to us for reloading of any commodity that might be available for transportation and movement back to Brownsville for interchange with the Missouri Pacific and Southern Pacific.

Effective about June 1, 1936, by agreement between the Rio Grande, Missouri Pacific and Southern Pacific, the turning basin of the Port of Brownsville, as hereinabove described, was placed in the switching limits of Brownsville, Texas. The purpose of including the turning basin in the switching limits of Brownsville was to give to the Port of Brownsville the benefit of the freight rates available to and from Brownsville and the benefit of Brownsville switching rates.

The Rio Grande has never owned any substantial amount of box cars, flat cars or gondola cars for the transportation of commodities to and from points on its line of railway. The equipment has heretofore been furnished by the Missouri Pacific and the Southern Pacific under the American Railway Association's car service rules. The Rio Grande has operated under those rules for the interchange of loaded [fol. 168] cars and empty cars with the Missouri Pacific and Southern Pacific since my tenure of office as General Manager of the Rio Grande. The car service rules of the American Railway Association provides renumeration for the use of cars owned by one carrier and operated and used by another carrier. That remuneration is known in the railway industry as "per diem." It is customarily a charge of One Dollar per day for use of equipment while in the use of a railroad not owning the cars. The Rio Grande has at all times, where it has made use of equipment furnished it by the Missouri Pacific and Southern Pacific, complied with these American Railway Association car service rules, and it has paid the per diem to the Missouri Pacific and Southern Pacific as required by the terms and conditions of those rules. We have never refused to abide by the rules, or to pay the charges therein prescribed.

The Rio Grande is ready and willing, and is properly equipped, to handle the traffic to and from the Port of Brownsville turning basin and the City of Brownsville for interchange with the Missouri Pacific and Southern Pacific. We are ready and willing to transport empty cars from Brownsville to the turning basin and to transport the returning loads to the interchange points. We are ready and willing to transport loaded cars from the turning basin to the interchange at Brownsville under the published switching tariff published by us as a result of the agreement with the Southern Pacific and Missouri Pacific hereinabove referred to. A copy of said tariff, marked Exhibit A, is attached hereto.

The Rio Grande did so transport commodities and empty cars so long as they were furnished by the Missouri Pacific and Southern Pacific. We have only discontinued so transporting the cars after said carriers refused to furnished the equipment or refused to receive from us cars loaded at the [fol. 169] turning basin. This refusal of the Missouri Pacific and the Southern Pacific related only to the traffic moving to and from Mexico. As to all other traffic, they have continued to furnish us equipment, and we have continued to transport it under the car service rules of the American Association of Railways, hereinabove referred to.

Further affiant sayeth not.

(Signed) L. S. Bourne.

Sworn to and subscribed before me this 15th day of February, 1937, to certify which witness my hand and seal of office. (Signed) Laura Pollock, Notary Public, Cameron County, Tex. (Seal.)

(Photostat of Exhibit A found at side folio 125 of this record.)

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AFFIDAVIT OF LESLIE C. FITCH

STATE OF TEXAS,
County of Dallas:

Before me, the undersigned authority, on this day personally appeared Leslie C. Fitch, known to me, who after being duly sworn deposed and said:

My name is Leslie C. Fitch. I am a statistical engineer residing in Dallas, Texas. I have had twenty years railway accounting experience, all of which was with the Missouri Pacific and Southern Railways in Texas. In my accounting experience with the Missouri Pacific Railway I personally made settlement checks between that carrier and the National Railways of Mexico dealing with the interchange of equipment between that carrier and the National Railways of Mexico.

The American railways have an association known as the Association of American Railroads which promulgates [fol. 170] the rules and regulations for car service and interchange of cars between railroads. These are known as the "Code of Car Service Rules" and the "Code of Per Diem Rules." These rules as established by the Association of American Railroads govern the interchange of cars between the carriers and specifically provide for the hiring of equipment by lines not owning equipment. For instance, short line railways in America do not generally own their own equipment, but hire it from the trunk line railroads under these rules and regulations. These rules and regulations were reviewed and approved as modified by the Interstate Commerce Commission in Docket 17801, styled Rules for Car Hire Settlement, 160 ICC 369-444-445. One of the rules as approved and prescribed in that opinion by the Commission was set aside by the Federal Court, but it had to do with the allowance of free time to the short line railroads. The remaining rules were uniform and are now in effect. They do govern the interchange of cars between all American railroads and the National Railways of Mexico, and Canadian railroads. They provide for the hiring of equipment by a railroad not owning equipment from the railroads that do own it, and a charge of $1.00 per day per car is made for the rental of equipment. This charge was based upon an investigation by the Interstate Commerce Commission and by the railroads for the specific purpose

of determining a reasonable charge for the rental of equipment.

The railways of the United States, Canada and Mexico have on file with the Interstate Commerce Commission a Railway Equipment Register, ICC No. 243, in which there are listed the names of the railways interchanging equipment with each other under the rules and regulations prescribed by the Commission and as established by the Association of American Railroads. The latest issue of [fol. 171] the Equipment Register, at page 1056, lists the National Railways of Mexico as a participating carrier in the interchange arrangements with the American railroads. This interchange arrangement is for the purpose of car distribution and per diem car rental reports as well as for car repairs, freight claim accounting, interline freight accounting, etc.

The Missouri Pacific and the Southern Pacific Railways have always interchanged with the National Railways of Mexico under these rules and under the terms and rules prescribed by the Commission. There is a slight modification of the rental charge due to certain taxes exacted in Mexico. In all other respects, however, the interchange and the rental charges are the same. The Missouri Pacific have permitted their equipment, and do permit their equipment, to interchange with the National Railways of Mexico, and to move into Mexico loaded and they do send empty equipment into Mexico for the purpose of obtaining loads under these rules and regulations. It is a common practice of the American railways to permit their equipment to move into Mexico loaded, and to permit empty equipment to move into Mexico for the purpose of obtaining loads.

Further affiant sayeth not.

(Signed) Leslie C. Fitch.

Subscribed and sworn to before me this 18th day of February, 1937, to certify which witness my hand and seal of office. (Signed) W. C. Scurry, Notary Public in and for Dallas County, Texas. (Seal.)

[fol. 172] AFFIDAVIT OF F. A. LALLIER

STATE OF TEXAS,
County of Cameron:

Before me, the undersigned authority, on this day personally appeared F. A. Lallier, who being by me first duly sworn upon his oath deposes and says:

That I am engaged in the steamship stevedore business. I am an ocean freight broker, and I am also engaged in the forwarding business, namely, that of shipping commodities to and from and through the Port of Brownsville for the account of a large number of people located in Mexico. For the service of acting as forwarding agent, stevedore and freight broker, I receive charges varying in amounts based upon the weight, size and character of the articles handled. I established my business at the Port of Brownsville and in the community of Brownsville, solely because of the opening of the Port and solely because of the opportunity to move substantial tonnage for shippers and owners through that port to and from Old Mexico, and to and from the Rio Grande Valley territory. I have, during the past and since the opening of the Port, moved a substantial quantity of commodities through the Port of Brownsville to and from Mexico. Prior to the opening of the Port of Brownsville on or about May 16, 1936, and subsequent thereto, I have made contracts with shippers and owners of commodities for the movement thereof through the Port of Brownsville to and from Mexico. The commodities which have been covered by contracts already made and which can be made the subject of future contracts are: Cotton, cotton linters, cottonseed cake, coke, iron and steel, pipe, farm implements and various descriptions of merchandise traffic. If railroad transportation between the Port of Brownsville and an interchange point with the National Railways of Mexico at Matamoros, state of Tamaulipas, Mexico, is [fol. 173] provided, I state that the following commodities in the quantities named can be handled annually through the Port of Brownsville in interchange service between water carriers and rail carriers:

50,000 bales of cotton.
10,000 tons of cottonseed cake.
100,000 tons of lead bullion.
72,000 tons of coke.

10,000 tons of steel billets.
4,000 bales of cotton linters.
12,000 tons of cement.
25,000 tons of zinc concentrate.
25,000 tons of general merchandise traffic.

I have definite arrangements made for the movement of this traffic to and from Mexico through the Port of Brownsville. I have definite understandings for the trans-shipment of these commodities in the quantities described from rail carriers to water carriers through the Port of Brownsville, and from water carriers to the rail carriers through the Port of Brownsville, or originating and destined to points in Mexico, and moving to and from the United States.

If this traffic is not handled through the Port of Brownsville to and from Mexico, it will be handled through various other ports along the Gulf of Mexico, principally Galveston, Houston and Corpus Christi. To some extent it will be diverted to Tampico, Mexico. Unless the transportation service is provided through Brownsville, it will be diverted from Brownsville in all instances.

In those instances where the tonnage above described is diverted to the Ports of Galveston, Houston and Corpus Christi, it will move principally in, to and from Old Mexico through the gateway of Laredo, Texas. At Laredo, Texas the same interchange service as between the railways of [fol. 174] the United States and the railways of Mexico, will be required. At Laredo, Texas the same railway equipment will be used to interchange the traffic that would be required in the handling of it through the Port of Brownsville for interchange at Matamoros, state of Tamaulipas, Mexico. At Laredo, Texas the identical commodities which I have arranged to have handled through the Port of Brownsville, are now being handled and interchanged between the Missouri Pacific Railway and the railways of Mexico for transportation to and from Mexico and rehandled largely at the Port of Corpus Christi, Texas. At the Gateway of Laredo, the Missouri Pacific Railway is delivering these identical commodities to the National Railways of Mexico for transportation into Mexico, and at Laredo, Texas, the Missouri Pacific Railway is receiving from the National Railways of Mexico the identical commodities for transportation to other Texas ports.

At the gateway of Laredo, Texas the Missouri Pacific Railway is furnishing its equipment for this interchange service.

The Missouri Pacific Railway is furnishing necessary and adequate equipment to transport the identical commodities that would otherwise move through Brownsville, except for the refusal of the rail carrier to transport the commodities at Brownsville, and is moving said commodities through other Texas ports and through the gateway of Laredo and interchanging them with the National Railways of Mexico at Laredo in identically the same manner that it is desired to have the commodities interchanged as between the Missouri Pacific Railway at Brownsville and the National Railways of Mexico at Matamoros, state of Tamaulipas, Mexico.

The diversion of the tonnage from Brownsville to other gateways is resulting in an annual loss of net revenue that would otherwise accrue to me in the shipping and inter- [fol. 175] change of the commodities through Brownsville, of approximately $25,000.00 per annum.

The Missouri Pacific Railway has various agents and representatives located throughout Mexico, and particularly at points where substantial tonnage is originated or terminated, and these agents and representatives of the Missouri Pacific Railway have actively solicited the movement of commodities which I have arranged to move through Brownsville, for movement through other gateways, principally Laredo and Corpus Christi, Texas. These representatives of the Missouri Pacific Railway have informed shippers and receivers of commodities in Mexico that if they are routed through Brownsville, the Missouri Pacific will not transport them from Brownsville to a connection with the National Railways in the community of Matamoros. On the other hand, the same representatives of the Missouri Pacific Railway, with respect to the same identical commodities, have informed shippers and receivers of freight in Mexico that if the commodities are routed and shipped through Corpus Christi and Laredo, or other Texas ports and Laredo, that the Missouri Pacific will furnish the necessary equipment and transport the commodities to Laredo and interchange them freely with the National Railways of Mexico at Laredo. These representatives of the Missouri

Pacific have actively interfered with the development and movement of tonnage through Brownsville, by informing shippers and owners of commodities in Mexico that that line will not transport them and interchange them with the National Railways of Mexico if shipped through Brownsville, and at the same time have advised such shippers and owners of commodities in Mexico that they will transport them and will interchange them, and will furnish any equipment for that purpose, at Laredo, Texas but will not furnish it for that purpose at Brownsville, Texas.

[fol. 176] If the commodities herein described are forwarded through the gateway of Laredo, Texas for transportation to ports other than Brownsville, the Missouri Pacific Railway will furnish its equipment for the transportation from Mexico to other Texas ports and will furnish its equipment for the transportation from other Texas Ports to Mexico. In all cases, the interchange between the Missouri Pacific and the National Railways of Mexico at Laredo and Nuevo Laredo will be identical with the interchange between the Missouri Pacific and the National Railways of Mexico at Brownsville, Texas and Matamoros, Tamaulipas, Mexico. The same identical commodities which we have arranged to have transported through the port of Brownsville will be handled in the same identical manner at Laredo, Texas by the Missouri Pacific, as we seek to have them handled by the Missouri Pacific at Brownsville, Texas. The same identical equipment will be utilized in the interchange between the Missouri Pacific and the National Railways of Mexico at Laredo as will be required for the interchange between the same railways at Brownsville and Matamoros. It will not require any additional or any different kind or character of equipment for the interchange at Brownsville and Matamoros than is being used for the intercha-ge at Laredo, Texas and Nuevo Laredo, Mexico.

Further affiant sayeth not.

(Signed) F. A. Lallier.

Sworn to and subscribed before me this 15th day of February, 1937, to certify which witness my hand and seal of office. (Signed) Laura Pollock, Notary Public, Cameron County, Texas. (Seal.)

[fol. 177] AFFIDAVIT OF J. G. PHILEN, JR.

STATE OF TEXAS,
County of Cameron:

Before me, the undersigned authority, on this day personally appeared J. G. Philen, Jr., who being by me first duly sworn upon his oath deposes and says:

That I am engaged in the steamship stevedore business. I am an ocean freight broker, and I am also engaged in the forwarding business, namely, that of shipping commodities to and from and through the Port of Brownsville for the account of a large number of people located in Mexico. For the service of acting as forwarding agent, stevedore and freight broker, I receive charges varying in amounts based upon the weight, size and character of the articles handled. I established my business at the Port of Brownsville and in the community of Brownsville solely because of the opening of the Port and solely because of the opportunity to move substantial tonnage for shippers and owners through that port to and from Old Mexico, and to and from the Rio Grande Valley territory. I have, during the past and since the opening of the Port, moved a substantial quantity of commodities through the Port of Brownsville to and from Mexico. Prior to the opening of the Port of Brownsville on or about May 16, 1936, and subsequent thereto, I have made contracts with shippers and owners of commodities for the movement thereof through the Port of Brownsville to and from Mexico. The commodities which have been covered by contracts already made and which can be made the subject of future contracts are: Cotton, cotton linters, cottonseed cake, coke, iron and steel, pipe, farm implements and various descriptions of merchandise traffic. If railroad transportation between the Port of Brownsville and an interchange point with the National Railways of Mexico at Matamoros, state of Ta- [fol. 178] maulipas, Mexico, is provided, I state that the following commodities in the quantities named can be handled annually through the Port of Brownsville in interchange service between water carriers and rail carriers:

50,000 bales of cotton.
10,000 tons of cottonseed cake.
100,000 tons of lead bullion.

10,000 tons of scrap iron.
4,000 bales of cotton linters.
12,000 tons of cement.
25,000 tons of zinc concentrate.
25,000 tons of general merchandise.

I have definite arrangements made for the movement of this traffic to and from Mexico through the Port of Brownsville. I have definite understandings for the trans-shipment of these commodities in the quantities described from rail carriers to water carriers through the Port of Brownsville, and from water carriers to the rail carriers through the Port of Brownsville originating and destined to points in Mexico and moving to and from the United States.

If this traffic is not handled through the Port of Brownsville to and from Mexico, it will be handled through various other ports along the Gulf of Mexico, principally, Galveston, Houston and Corpus Christi. To some extent, it will be diverted to Tampico, Mexico. Unless the transportation service is provided through Brownsville, it will be diverted from Brownsville in all instances.

In those instances where the tonnage above described is diverted to the Ports of Galveston, Houston and Corpus Christi, it will move principally in, to and from Old Mexico through the gateway of Laredo, Texas. At Laredo, Texas the same interchange service as between the railways of the United States and the railways of Mexico, will be re- [fol. 179] quired. At Laredo, Texas the same railway equipment will be used to interchange the traffic that would be required in the handling of it through the Port of Brownsville for interchange at Matamoros, state of Tamaulipas, Mexico. At Laredo, Texas the identical commodities which I have arranged to have handled through the Port of Brownsville, are now being handled and interchanged between the Missouri Pacific Railway and the railways of Mexico for transportation to and from Mexico and rehandled largely at the Port of Corpus Christi, Texas. At the gateway of Laredo, the Missouri Pacific is delivering these identical commodities to the National Railways of Mexico for transportation into Mexico, and at Laredo, Texas the Missouri Pacific Railway is receiving from the National Railways of Mexico the identical commodities for transportation to other Texas ports.

At the gateway of Laredo, Texas the Missouri Pacific Railway is furnishing its equipment for this interchange service.

The Missouri Pacific Railway is furnishing necessary and adequate equipment to transport the identical commodities that would otherwise move through Brownsville, except for the refusal of the rail carrier to transport the commodities at Brownsville, and is moving said commodities through other Texas ports and through the gateway of Laredo and interchanging them with the National Railways of Mexico at Laredo in identically the same manner that it is desired to have the commodities interchanged as between the Missouri Pacific Railway at Brownsville and the National Railways of Mexico at Matamoros, state of Tamaulipas, Mexico.

The diversion of the tonnage from Brownsville to other gateways is resulting in an annual loss of net revenue that would otherwise accrue to me in the shipping and interchange of the commodities through Brownsville of approximately $25,000.00 per annum.

[fol. 180] The Missouri Pacific Railway has various agents and representatives located throughout Mexico, and particularly at points where substantial tonnage is originated or terminated, and these agents and representatives of the Missouri Pacific Railway have actively solicited the movement of commodities, which I have arranged to move through Brownsville, for movement through other gateways, principally Laredo and Corpus Christi, Texas. These representatives of the Missouri Pacific Railway have informed shippers and receivers of commodities in Mexico that if they are routed through Brownsville, the Missouri Pacific will not transport them from Brownsville to a connection with the National Railways of Mexico in the community of Matamoros. On the other hand, the same representatives of the Missouri Pacific Railway, with respect to the same identical commodities, have informed shippers and receivers of freight in Mexico that if the commodities are routed and shipped through Corpus Christi and Laredo, or other Texas ports and Laredo, that the Missouri Pacific will furnish the necessary equipment and transport the commodities to Laredo and interchange them freely with the National Railways of Mexico at Laredo. These representatives of the Missouri Pacific have actively interfered

with the development and movement of tonnage through Brownsville by informing shippers and owners of commodities in Mexico that that line will not transport them and interchange them with the National Railways of Mexico if shipped through Brownsville, and at the same time have advised such shippers and owners of commodities in Mexico that they will transport them and will interchange them, and will furnish any equipment for that purpose, on traffic moving through Laredo, Texas, but will not furnish it for that purpose on traffic moving through Brownsville, Texas. [fol. 181] If the commodities herein described are forwarded through the gateway of Laredo, Texas for transportation to ports other than Brownsville, the Missouri Pacific Railway will furnish its equipment for the transportation from Mexico to other Texas ports and will furnish its equipment for the transportation from other Texas ports to Mexico. In all cases, the interchange between the Missouri Pacific and the National Railways of Mexico at Laredo and Nuevo Laredo will be identical with the interchange between the Missouri Pacific and the National Railways of Mexico at Brownsville, Texas and Matamoros, Tamaulipas, Mexico. The same identical commodities which we have arranged to have transported through the Port of Brownsville will be handled in the same identical manner at Laredo, Texas by the Missouri Pacific, as we seek to have them handled by the Missouri Pacific at Brownsville, Texas. The same identical equipment will be utilized in the interchange between the Missouri Pacific and the National Railways of Mexico at Laredo as will be required for the interchange between the same railways at Brownsville and Matamoros. It will not require any additional or any different kind or character of equipment for the interchange at Brownsville and Matamoros than is being used for the interchange at Laredo, Texas and Nuevo Laredo, Mexico.

Further affiant sayeth not.

(Signed) J. G. Philen, Jr.

Sworn to and subscribed before me this 15th day of February, 1937, to certify which witness my hand and seal of office. (Signed) Laura Pollock, Notary Public, Cameron County, Texas. (Seal.)

The Court: Do you want any further time to file briefs?

[fol. 182] Mr. Reed: I want to reply to the briefs and I understand Mr. Kelley says he wants to file an additional affidavit.

Mr. Kelley: I think—I am not quite sure; I haven't had a chance to read Mr. Reed's affidavits—but from what he says I am quite sure I will want to file counter affidavits, and I can do that not later than Monday or Tuesday; and I think by Monday.

The Court: How much time do you want?

Mr. Reed: I can have my brief in here by Wednesday.

The Court: Of next week?

Mr. Reed: Yes, sir.

Mr. Kelley: Do you want a copy of these other affidavits of mine before you write your brief?

Mr. Reed: Yes, sir.

The Court: Then I can expect everything to be in by the 27th.

Mr. Tallichet: That is Saturday of next week?

The Court: Yes, sir.

Mr. Tallichet: Yes. It is unlikely that I will want to file additional affidavits, but I may.

[fol. 183] The Court: Everything will be in by that date.

Mr. Reed: We will appreciate just as early a decision on this jurisdictional question as possible.

The Court: Yes.

Mr. Reed: Of course it has not been the Court's fault that it has been delayed in any respect. It is just one of those unfortunate cases and unfortunate that the record had to be handled in this respect.

The Court: I guess the record shows somewhere the St. Louis Court order?

Mr. Kelley: Yes, I put that in so you would have it.

The Court: It will be marked "submitted".

(The stipulation of March 20, 1937, is as follows:)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION

At Law. No. 952

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY ET AL., Relators,

versus

THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, GUY A. THOMPSON, Trustee, et al., Respondents

STIPULATION

On the trial of the above cause in the District Court it was agreed that without physical incorporation in the rec-
[fol. 184] ord, the report and order of the Interstate Commerce Commission entitled Rules for Car-hire Settlement, 160 I. C. C. 369, and 165 I. C. C. 495, should be deemed to be a part of the evidence. On the appeal of this case it is likewise agreed that said report and order shall be deemed to be a part of the record and may be referred to as such by the Court or counsel, provided that if the Court shall object to an incorporation of the same into the record by reference, the attorneys shall have the right, unless the Court objects, to incorporate physically into the record a copy of said report and order.

In Testimony Whereof, witness our signatures this 20th day of March, 1937.

Brownsville Navigation District of Cameron County, Texas, et al., by A. L. Reed, Their Attorneys. Guy A. Thompson, Trustee of The St. Louis, Brownsville & Mexico Railway Company, by R. H. Kelley, Its Attorneys. Port Isabel & Rio Grande Valley Railway Company, by J. H. Tallichet, Its Attorney.

Approved on the date above mentioned.

T. M. Kennerly, U. S. District Judge.

It is agreed that the above and foregoing is a full, true and correct statement of the evidence adduced and pro-
[fol. 185] ceedings had upon the hearing of the motion to

dismiss for lack of jurisdiction and that the same shall constitute the bill of exceptions on this appeal.

Brownsville Navigation District of Cameron County, Texas, et al., by A. L. Reed, A. B. Cole, Their Attorneys. Guy A. Thompson, Trustee of The St. Louis, Brownsville & Mexico Railway Company, by E. H. Crenshaw, Jr., R. H. Kelley, Its Attorneys. Port Isabel & Rio Grande Valley Railway Company, by J. H. Tallichet, Its Attorney.

ORDER APPROVING BILL OF EXCEPTIONS

The above and foregoing bill of exceptions, having been agreed to by counsel and examined by me, is hereby approved and ordered filed as a part of the record on this appeal.

Mch. 25, 1937.

T. M. Kennerly, United States District Judge.

[fol. 186] Clerk's certificate to foregoing transcript omitted in printing.

Waiver of Issuance of Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * *

[fol. 187] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of June 14th, 1937

No. 8420

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, et al.,

versus

ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, Guy A. Thompson, Trustee, and Port Isabel and Rio Grande Valley Railway Company

On this day this cause was called, and, after argument by A. L. Reed, Esq., for appellants, and R. H. Kelley, Esq., for appellees, was submitted to the Court.

[fol. 188] OPINION OF THE COURT AND DISSENTING OPINION OF HUTCHESON, CIRCUIT JUDGE—Filed July 15, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8420

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, et al., Appellants,

versus

ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, Guy A. Thompson, Trustee, and Port Isabel and Rio Grande Valley Railway Company, Appellees

Appeal from the District Court of the United States for the Southern District of Texas

(July 15, 1937)

Before Foster, Hutcheson and Holmes, Circuit Judges

HOLMES, Circuit Judge:

The appellants are the Brownsville Navigation District of Cameron County, Texas, duly incorporated under the

laws of Texas[1] (hereinafter referred to as the Port of Brownsville); F. A. Lallier, engaged in the stevedore, freight brokerage, and forwarding business; and J. G. [fol. 189] Philen, Jr., sole owner and operator of two companies engaged in the same business as Lallier. The appellees are Guy A. Thompson, trustee in bankruptcy of the St. Louis, Brownsville & Mexico Railway Company, a Texas corporation, now being operated by said trustee, in proceedings for reorganization of said corporation, who is sued by consent of court (hereinafter referred to as the Missouri Pacific); and the Port Isabel and Rio Grande Valley Railroad Company, a Texas corporation (hereinafter called the Rio Grande). The jurisdiction of the court arises out of the Interstate Commerce Act, as amended, and carrier rules, rates, regulations, and practices thereunder.

The petition charges that appellees have unlawfully failed and refused to furnish railroad cars for the transportation of interstate shipments when reasonably requested so to do by appellants. The facts, set forth in great detail in the petition, were met by a motion to dismiss for want of jurisdiction, which was sustained by the court on the ground that the matter involved was one for the administrative powers of the Interstate Commerce Commission.

The Port of Brownsville caused a ship channel, seventeen miles in length, to be dredged from Brazos Santiago Pass, on the Gulf of Mexico, inland to a point approximately five miles from the geographical center of the city of Brownsville. It is a modern ship channel of a depth and width sufficient for seagoing vessels of a type usually calling at ports on the Gulf of Mexico from New Orleans to Brownsville. The Rio Grande operates a line of railway, approximately twenty-six miles in length, between said city and Port Isabel in Cameron County, Texas, and is the only railway that has switching connections with the facilities of the turning basin at said port. It connects in the city of Brownsville with the Missouri Pacific lines.

In order to move traffic from said turning basin to up- [fol. 190] town Brownsville and to a connection with the

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[1] Chaper 192, House Bill 724, 41 Regular Session, and Chapter 3, Senate Bill 29, 42 Regular Session, of the laws of Texas.

railways of Mexico serving Matamoros, it is necessary to use the joint service of both the Rio Grande and the Missouri Pacific. It has been customary for the Missouri Pacific and other carriers to furnish cars (box, flat, and gondola) to the Rio Grande for the purpose of moving traffic originating on, or consigned to locations on, the latter's line of railway, at an agreed rental of one dollar per day, being the uniformly accepted charge for the use of rented cars.

The appellees have published, and have on file with the Interstate Commerce Commission, tariffs applicable to the proposed traffic, but have recently refused to furnish cars for freight moving through the Port of Brownsville. The Missouri Pacific obtains a longer haul of the same traffic when it moves through other ports. Both carriers are members of the American Railway Association, and are subscribers to an agreement which provides for an interchange of cars under a code of rules adopted by the association, the general principle of which is that payment shall be made to the car owner for each day the car is off of the owner's lines. Cf. Chicago, Rock Island & Pacific Railway Co. v. United States, 284 U. S. 80.

The Missouri Pacific, under duly published tariffs, is furnishing transportation equipment for all commodities from the ports of Corpus Christi and Houston to various gateways for interchange with the National Railways of Mexico for transportation into Mexico, but refuses to apply its duly filed tariff rates and rules to commodities moving through the Port of Brownsville.

It is specifically alleged in the petition that, subsequent to May 16, 1936, the Missouri Pacific refused, and is now refusing, to furnish the necessary cars, and that the Rio Grande, in accordance with instructions of the Missouri Pacific, is refusing to permit shippers to load cars that are made empty at the docks of the turning basin; and [fol. 191] that it specifically refused transportation of cars that had been loaded at the turning basin. The only apparent reason for appellee's conduct with reference to the Port of Brownsville is that the Missouri Pacific system will secure a longer haul if the traffic passes into and out of Mexico through other gateways.

The sole question presented on this appeal is the jurisdiction of the district court to issue a writ of mandamus requiring appellees to perform their transportation duties

under rates published and filed with the Interstate Commerce Commission. Two of the appellants are shippers' agents, handling freight at the Port of Brownsville for transportation by rail and water to and from the United States of America and the Republic of Mexico. Upon the undisputed facts, these two appellants, as agents of the shippers, tendered freight to the appellees, who failed to transport it; they made request for railroad cars for use in interstate commerce and were denied them. They stand in the same position as their principals, and are held to be persons within the meaning of the statute. When a carrier is tendered goods for transportation, it is immaterial that the shipper is not the real owner of the goods. Interstate Commerce Commission v. Delaware L. & W. R. Co., 220 U. S. 235, 31 Sup. Ct. 392; Lehigh Valley Ry. v. United States, 243 U. S. 444, 37 Sup. Ct. 434; Merchants Warehouse Co. v. United States, 283 U. S. 501, 51 Sup. Ct. 505.

As to the remedy: the petition for mandamus is based upon the Interstate Commerce Act, as amended. 49 U. S. C. A. 49. It gives the district court jurisdiction in an unusual degree to issue the writ against an interstate carrier commanding it "to move and transport traffic, or to furnish cars or other facilities for transportation, for the party applying for the writ." It declares that the remedy given shall be cumulative and shall not exclude or interfere [fol. 192] with other remedies provided by the statute. Macon, D. & S. R. Co. v. General Reduction Co., 44 Fed. (2) 499.

As to the right: under the Transportation Act of February 28, 1920 (c. 91, Sec. 402, 41 Stat. 476, 49 U. S. C. A., Sec. 1, par. 11), as well as at common law, it is the duty of a common carrier by railroad to furnish the shipper upon reasonable request with necessary cars as an essential step in the intended movement of the property to be shipped. Ordinarily, a shipper is entitled to as many cars as are needed, but this is not an absolute right. As at common law the carrier was not liable for failure to transport, if his coach were full, the law today exacts only what is reasonable from carriers who transport freight in railroad cars.

Legal defenses may be interposed to an action for damages or a petition for mandamus based upon the refusal of the carrier to furnish cars, but the fact that the defendant

has a legal excuse does not deprive the court of jurisdiction to hear and decide the issues upon the law and the facts. The appellees are sued jointly, but may make joint or several defenses, as they deem proper. Likewise, the court may enter its judgment for or against one or more of the parties, as law and justice may require. The district court is not deprived of jurisdiction to grant the writ of mandamus merely because the appellants, or some of them, might have prosecuted an action at law for damages or might have sought reparation or other administrative relief before the Interstate Commerce Commission.

There are two forms of discrimination under the Transportation Act; one in the rule, rate, or practice, the other in its application or enforcement; one in promulgating an unreasonable and prejudicial rule, rate, or practice, the other in unfairly and prejudicially enforcing a fair and non-discriminational rule, rate, or practice. In a suit where the published rule, rate, or practice itself is attacked as [fol. 193] unfair and unreasonably prejudicial, an issue is presented which calls for the exercise of the administrative power of the Interstate Commerce Commission, but if the carrier's rule, rate, or practice, as promulgated and filed, is fair and reasonable on its face, and has been unfairly applied or enforced so as to discriminate unreasonably and prejudicially against the shipper, there is no administrative question involved but a mere judicial question of fact as to whether the carrier has violated the rule to the plaintiff's damage. "Such suits," the court held in Pennsylvania R. R. Co. v. Puritan Coal Company, 237 U. S. 121, "though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal courts." The opinion also differentiates the case of Morrisdale Coal Co. v. Pennsylvania Railroad, 230, U. S. 304, where the reasonableness of the rule was a matter for the commission, because the plaintiff admitted that it had received all the cars to which it was entitled under the carrier's rule.

It is true that the carriers in this case have published no joint through rate, but it is admitted that they are connecting carriers, that the commerce which appellants seek to have transported over appellees' joint lines is a through movement between the port of Brownsville and the interchange with the National Railways of Mexico; and that

both of the appellees have promulgated and filed with the Commission tariffs naming per car charges for such through transportation. Therefore, there is a through route composed of the two lines of railway, there is a through rate composed of two separately published tariff factors; and there is joint responsibility for the through transportation. Atlantic Coastline Railway Co. v. Smith Bros., 63 F. (2) 747, certiorari denied, 289 U. S. 761, 53 Sup. Ct. 795.

The law specifically defines through rates, and adds (Sec. [fol. 194] 6, par. 1): "If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation." Referring specifically to this section, in Kansas City Southern Ry. Co. v. Albers Commission Co., 223 U. S. 573, 32 Sup. Ct. 316, the court said: "In every substantial sense, local rates and joint through rates were placed on the same level." In United States v. Illinois Central R. R. Co., 263 U. S. 515, the court pointed out that the distinction between a joint and combination rate is without legal significance, and said: "A through route was established; and the transportation is performed as a result of this arrangement, express or implied."

The Interstate Commerce Act does not require a joint through rate on each route, but "where no joint rate is specified, the tariffs for the through routes commonly provide that the through rate shall be the sum of the local rates of the several connecting carriers contributing to the movement." Brown Lumber Co. v. L. & N. R. Co., (Jan. 4, 1937), 299 U. S. 393. In this recent case, the court, upon the authority of Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285, upheld the carrier's construction of its published rule, notwithstanding the Commission, by reparation order, had sustained the shipper's claim. If the law is what the courts do, even more than what they say, this is an authority in two aspects for the doctrine that the construction and enforcement of non-technical, unambiguous railroad tariffs present a question of law for judicial determination.

The appellants are not here assailing any published rule, rate, or practice. They have requested transportation facilities to be furnished under the regular tariffs on file with

the Interstate Commerce Commission. The relief sought [fol. 195] is an order commanding the carriers to furnish cars and transport traffic. There is no car shortage and no emergency which renders the carriers unable to comply with such an order. There is no plea that the appellees cannot rent or otherwise obtain the necessary equipment. There is no request or necessity for an order requiring the Missouri Pacific to send its equipment to foreign soil. There is no necessity for an administrative order requiring the carriers to establish a through route, which is merely "an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another."[2] A through route is already established; through carriage implies a through rate, and it does not admit of dispute that adequate car service is the only requisite to rail transportation sought by appellants at this time.

The district court has jurisdiction to grant the petition for mandamus, and the fact, if it be a fact, that the petition discloses unreasonable and prejudicial discrimination by any carrier against the Port of Brownsville is not sufficient to defeat jurisdiction to issue the writ. Such discriminational practice may be a proper subject for investigation and determination by the Commission under the amendment of August 12, 1935 (49 Stat. 607, c. 509), but no such administrative relief is sought in this cumulative proceeding which is solely for judicial relief by writ of mandamus for the alleged failure of the carriers to perform their transportation duties to furnish cars in accordance with the published tariffs, and to desist from an unfair and discriminational enforcement of fair and reasonable published tariffs, regulations, and transportation agreements with respect to car service. The case should be heard and decided on the [fol. 196] merits, notwithstanding any cumulative remedies of a judicial or administrative nature which may be available to appellants.

The judgment dismissing the petition is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

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[2] St. Louis S. W. Ry. Co. v. United States, 245 U. S. 136, 139, note 2.

HUTCHESON, Circuit Judge, dissenting:

If I could agree with my associates that "the sole question presented on this appeal is the jurisdiction of the District Court to issue a writ of mandamus requiring appellees to perform their transportation duties under rates published and filed with the Interstate Commerce Commission," I should be bound to agree with them that the District Judge should have taken jurisdiction, and going further, to hold that the mandamus should have been granted. No one questions or could question that the District Courts of the United States are given such jurisdiction by statute.

As I read the record, the question presented on this appeal is an entirely different one. It is, whether, under the circumstances as disclosed by the petition, the answer, and the proofs taken on the motion to dismiss for want of jurisdiction, the relief sought is administrative in its nature, and to be granted by the Commission, or judicial in its nature, and to be granted by the court.

I read the record as the District Judge did. To me it seems quite plain that what is in question here is not the performance of an established legal duty to carry tendered freight for an established legal charge, as in Macon vs. General Reduction Co., 44 Fed. (2d) 499; nor the refusal by the line on which the freight originates to perform its [fol. 197] obligatory duty to furnish cars, if it has them available. Huerfano Coal Co. vs. Colorado & S. E. Ry., 28 I. C. C. 502; Campbell River Creek Coal Co. vs. A. A. R. R. Co., I. C. C. 558; Ft. Worth & Denver City Ry. Co. vs. Strickland, 208 S. W. 410; Atchison, Topeka & Santa Fe vs. Smyth, 189 S. W. 70. What is in question here is the matter of car service and car distribution, and of the establishment of rules and practices in regard to it as applicable to a port in a case where the originating railroad has no cars available, there is no through rate, and the connecting line declines, because of traffic conditions which seem to it reasonable and proper, to furnish cars to be carried into Mexico where it gets only a small switching haul.

Boiled down, this is all that can be made of the case plaintiffs bring. Much is said in general terms of the in-

jury to the District and to the plaintiffs' brokers and forwarders, through discriminative practices in favor of Laredo and Corpus Christi, indulged in by the trustee's lines. Much is said of shipments lost, of freight diverted, and generally, of plans frustrated and hopes denied. There is, too, some definite specification of particular refusals of shipments, of particular actions with reference to railroad cars, tending to support the claim that in refusing to furnish cars to the Port Isabel line for the switching movements in question, the trustee is determined, consistent and resolute.

But this evidence was not needed, for he admits, indeed insists, that he has not furnished, and does not intend to furnish, cars for this movement. He denies that there is any law or regulation which compels him to, and insists that it is not discrimination to furnish cars for Mexican shipments where his road gets a line haul, and to refuse to furnish them where it gets only a meager switching charge. It is admitted by the Port Isabel Railroad Company that it will not, and cannot, furnish the cars demanded, not because it is averse to doing so, but because [fol. 198] it has none, and can get none unless the trustee will furnish them, or it can obtain funds to buy them. It avers that it is endeavoring to obtain a loan wherewith to buy cars, and that its efforts in that regard have been opposed and thwarted by the appellant District in this case.

There stands out in the pleadings, the affidavits, the admissions, the attitude and conduct of the parties, this stark, inescapeable fact, that just as firmly as plaintiffs in the court below, appellants here, believe that it would be reasonable and just to require defendants below, appellees here, to institute the practice of furnishing them with cars, and that they should be compelled to do so, appellees believe that such a practice would be unreasonable, and that an order requiring them to institute it would be unjust.

Like the District Judge, I do not find anything in the record upon which to rest a judicial pronouncement in favor of or against the practice invoked. As it did to the the District Judge, it seems clear to me, too, that under the circumstances obtaining here, as the pleadings, the affidavits, and the other proofs show them to be, there is presented for the administrative judgment of the Com-

mission, a question in regard to car service and car distribution matters peculiarly within its province.[1]

The majority opinion refers to the agreement existing between carriers for the exchange of cars. This agree- [fol. 199] ment is purely voluntary; it does not have the force of law.[2] It is for the Commission, under the authority of law, to deal with and prescribe rules and practices for situations of the kind in question here. It has not done so. Nothing in the record or the briefs points to any law or tariff, or any rule or order of the Commission, governing this situation. Courts may not take cognizance of a complaint brought to establish one. Nor may they, in the absence of the establishment of such a rule or order, take cognizance of a complaint for damages, or for mandamus, based on the claimed unreasonableness of assailed practices.

I had thought this definitely and beyond question settled. A reference to some of the authorities will show, I think, that it is.

Note 1. C. R. I. & P. Ry. vs. U. S., 284 U. S. 80; Assigned Car Cases 274 U. S. 564; United States vs. New River, 265 U. S. 533; Midland Valley vs. Barkley, 276 U. S. 482.

"By the Esch Car Service Act the Interstate Commerce Commission was given sweeping control over rules of car interchange and car hire settlement. Section 1(14) of this Act provides—'The Commission may, after hearing on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rule, regulations or practices.' " C. R. I. & P. Ry. vs. U. S., supra, p. 105.

Note 2. "The American Railway Association is, and has been since its inception, a purely voluntary organization. No carrier is bound to subscribe to its Code of Per Diem rules, and no carrier operating less than one hundred miles of road is eligible to voting membership." C. R. I. & P. vs. U. S., p. 103.

United States Nav. Co. vs. Cunard S. S. Co., 50 Fed. (2d) 83, was a suit for injunction. The court, in an exhaustive opinion[3] pointed out the great scope and sweep of the principle the Abilene case laid down, that there must be prior resort to the Commission wherever complicated questions of fact will arise, and experience in technical matters is required.

In L. & N. R. R. vs. Cory, 54 Fed. (2d) 8, a judgment obtained against a carrier for not furnishing cars when it did not have them available was reversed on the ground that the duty of defendant, which plaintiff alleged was breached, to provide itself with reasonably adequate facilities to perform its public service, presented an administrative question for the initial determination of the Commission. Here this precise question is presented as to the Port Isabel line, while as to the trustee's line, there is presented the sharply contested administrative ques-
[fol. 200] tion whether it is a reasonable or unreasonable practice to decline to furnish cars where there is no through route, and only a switching service to be performed by the connecting carrier.

In Carrollton vs. N. O. & N. E. R. R., 69 Fed. (2d) 691, a suit for damages and injuries caused by the claimed discriminatory application of rates, this was re-affirmed upon the authority of many cited cases. The court there said—

"Texas & Pacific R. R. vs. Abilene, 204 U. S. 426 was more than the decision of a case. It laid down principles having germinative and expansive power. Subsequent decisions following its lead have in the application of its principles to new facts, broadened and expanded them." c/f Norge Corporation vs. Long Island, 77 Fed. (2d) 312; Aron vs. Pa. R. R., 80 Fed. (2d) 100.

Atlantic Coast Line Ry. vs. Smith, 63 Fed. (2d) 747 cited by the majority as authority for its position that the connecting carrier, where there is no through rate, is obliged to furnish cars, is wholly without application here.

A suit for overcharges brought against all the carriers participating in a movement as to which there was no joint through rate, the holding was that the initial and connecting carriers, who sought to escape reparation for the rate

---

Note 3. "Approved in the Supreme Court in the same case, 284 U. S. 474, as ably and carefully drawn."

exacted by the terminal carrier, had made no proof rebutting the Commission's finding that the collection of the freight by the terminal carrier was the joint act of them all.

There is no such question here. What is sought is a court decree to compel a connecting carrier having no interest in or concern with a movement, except to perform a switching service, to furnish all cars which may be needed for shipments to Mexico, as to which there is no joint through rate, which do not originate on its lines, and in [fol. 201] regard to which it gets no line haul. Whether, under all the circumstances, the Commission under its plenary authority over car service and car distribution, could reasonably require the connecting carrier to institute this practice, is not before us. What is before us is whether there is any legal basis in this record for a finding and judgment that the legal duty to do so is so plain and clear as that, in advance of Commission action, it can be compelled by mandamus to perform it.

When the record is considered as a whole, in the light of the physical circumstances at the Port, and those involved in the transportation desired, in the light too of the authority of the Commission over matters of car service and distribution, and in the light of the discrimination claimed, I think it plain that the petition presents a matter not now ripe for the precise and legal mandate of a court, but needing first the informed administrative action of the Commission, under the undoubted authority over such matters the Congress has conferred upon it.

I respectfully dissent from the judgment of reversal.

[fol. 202] JUDGMENT

Extract from the Minutes of July 15th, 1937

No. 8420

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, et al.,

versus

ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, Guy A. Thompson, Trustee, and Port Isabel and Rio Grande Valley Railway Company

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appelle-s, St. Louis, Brownsville and Mexico Railway Company, Guy A. Thompson, Trustee, and Port Isabel and Rio Grande Valley Railway Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Hutcheson, Circuit Judge, dissenting."

[fol. 203] MOTION AND ORDER STAYING MANDATE—Filed July 27, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8420

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, et al., Appellants,

vs.

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, Guy A. Thompson, Trustee, and Port Isabel & Rio Grande Valley Railway Company, Appellees

To the Honorable the Circuit Court of Appeals for the Fifth Circuit and the Judges Thereof:

Now Come The St. Louis, Brownsville and Mexico Railway Company, Guy A. Thompson, Trustee, and Port Isabel & Rio Grande Valley Railway Company, Appellees, and respectfully represent:

1. That within the time prescribed by law, they intend to apply, jointly and severally, to the Supreme Court of the United States for a writ of certiorari to review the judgment of this Court rendered herein on July 15, 1937.

2. That application is being made to the Clerk of this Court for certification of the record to be used in connection with such application for certiorari.

Wherefore, appellees, jointly and severally, move that the issuance of the mandate of this Court be stayed until their applications for writ of certiorari shall be filed and disposed of, and for such other orders as may be appropriate in the premises.

(Signed) J. H. Tallichet, R. H. Kelley, Attorneys for Appellees.

[fol. 204] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 8420

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, et al., Appellants,

versus

ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, Guy A. Thompson, Trustee, and Port Isabel and Rio Grande Valley Railway Company, Appellees

On Consideration of the Application of the appellees in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellees to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 27th day of July, 1937.

(Signed) Rufus E. Foster, United States Circuit Judge.

[fol. 205] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 187 to 204 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8420, wherein Brownsville Navigation District of Cameron County, Texas, et al., are appellants, and St. Louis, Brownsville and Mexico Railway Company, Guy A. Thompson, Trustee, and Port Isabel and Rio Grande Valley Railway Company, are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 186 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 27th day of July, A. D. 1937.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit, by E. V. Vendling, Deputy Clerk. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 206] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: File No. 41,781. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 300. The St. Louis, Brownsville and Mexico Railway Company, et al., petitioners, vs. Brownsville Navigation District of Cameron County, Texas, et al. Petition for a writ of certiorari and exhibit thereto. Filed August 10, 1937. Term No. 300 O. T. 1937.

FILE COPY

Office - Supreme Court, U. S
FILED
AUG 10 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 300

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, GUY A. THOMPSON, TRUSTEE, AND PORT ISABEL & RIO GRANDE VALLEY RAILWAY COMPANY,
Petitioners,
v.
BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

J. H. TALLICHET,
Attorney for Port Isabel & Rio Grande Valley Railway Company;
ROBERT H. KELLEY,
Attorney for Guy A. Thompson, Trustee.

GILLESPIE-ALPHA CO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No.....

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, GUY A. THOMPSON, TRUSTEE, AND PORT ISABEL & RIO GRANDE VALLEY RAILWAY COMPANY,
Petitioners,
v.
BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL., *Respondents*

PETITION FOR CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The joint and several petition of Guy A. Thompson, Trustee of the properties and assets of The St. Louis, Brownsville and Mexico Railway Company, Debtor, and Port Isabel & Rio Grande Valley Railway Company, respectfully shows:

1. Respondents, Brownsville Navigation District of Cameron County, Texas, F. A. Lallier and J. T. Philen, Jr., applied to the District Court of the United States for the

Southern District of Texas, for a writ of mandamus against petitioners, commanding them to transport certain traffic, and to furnish adequate and sufficient cars for its transportation, between Matamoros, Mexico, and the Port of Brownsville, Texas (R. 4).

2. In their petition for mandamus, respondents alleged:

> "Said Respondent, Missouri Pacific (the Trustee), operates within Brownsville a depot and terminal facilities for the handling of the local traffic, for switching and other terminal purposes" (R. 9).
>
> "In order to move the traffic from the turning basin at the Port of Brownsville to uptown Brownsville and to a connection with the railways of Mexico serving Matamoros, it is necessary to use the joint service of both Respondents" (R. 10).
>
> " * * * respondent Missouri Pacific lines has refused and declined to furnish equipment to respondent Port Isabel Railway for the purpose of moving the traffic that is now available for transportation from the Port of Brownsville to Matamoros * * * " (R. 13).
>
> " * * * particularly is respondent, Missouri Pacific lines handling traffic under tariffs and charges similar to that herein described at Laredo, Texas, for the interchange and switching of traffic between Laredo in the State of Texas, and Nuevo Laredo * * * Tamaulipas, Mexico" (R. 14).
>
> "Heretofore at all times in the past and at the present time, respondent Missouri Pacific lines has furnished equipment, box cars, flat cars and gondola cars for the interchange of traffic coming from old Mexico into the United States through the various gateways, including Brownsville, Texas" (R. 14).
>
> "Respondent Missouri Pacific lines, has heretofore at all times in the past and is now at the present time, furnishing its equipment for the transportation of all commodities from ports of Corpus Christi and Houston, Texas, to various gateways including Laredo and Brownsville, Texas, for interchange with the national railways

of Mexico, for transportation into old Mexico * * *" (R. 15).

" * * * subsequent to May 16, 1936, and after the opening of the Port of Brownsville, respondent Missouri Pacific lines refused and declined and is now refusing and declining to furnish the necessary equipment for the movement of the traffic through Brownsville * * * " (R.17).

" * * * and respondent Missouri Pacific lines has acted with a deliberate design for the purpose of diverting the tonnage from the Port of Brownsville to other gateways * * * " (R. 20).

" * * * respondents are denying to the Port of Brownsville and the petitioners herein equal opportunity to move their traffic under interstate rates and charges lawfully on file with the Interstate Commerce Commission for the express purpose and design of diverting the traffic from the Port of Brownsville to other ports and other gateways. It is further specifically alleged that respondent Missouri Pacific lines is furnishing the equipment and permitting the traffic to move through other gateways and other ports * * * " (R. 23).

" * * * respondent Missouri Pacific lines will furnish the necessary equipment and facilities for the movement of identical traffic here involved via Corpus Christi and Laredo to Mexico and from Mexico via Laredo to Corpus Christi, and at the same time said respondent is refusing and declining and has refused and declined to furnish equipment and facilities for the transportation of the same identical commodities through Brownsville and Matamoros to and from the same origins and destinations in the nation of old Mexico" (R. 25).

" * * * the acts of respondents herein described are preventing them (appellants) from having interstate traffic moved by common carriers * * * at the same rates and charges and under the same terms and conditions under which respondents are transporting the identical traffic for other shippers and other gateways" (R. 26).

3. Petitioners pleaded to the jurisdiction of the District

Court on the ground that the matters involved are within the primary and exclusive jurisdiction of the Interstate Commerce Commission (R. 37, 47). The District Court, after hearing evidence on these pleas (R. 71-185), sustained them in a memorandum opinion (R. 56) and dismissed the petition for lack of jurisdiction (R. 59).

4. On appeal, the Circuit Court of Appeals for the Fifth Circuit (R. 188*), Circuit Judge Hutcheson dissenting (R. 196), held that the District Court had jurisdiction to grant the petition for mandamus, reversed the judgment of the District Court, and remanded the cause for further proceedings not inconsistent with the majority opinion (R. 202).

5. As shown by petitioners' map (R. 105), respondent District owns certain tracks which serve the turning basin of the Port of Brownsville. These connect with the tracks of petitioner, Port Isabel & Rio Grande Valley Railway Company, hereinafter called the Port Isabel. The tracks of the latter connect, in the City of Brownsville, with tracks of petitioner, Trustee. The Trustee's tracks connect with those of Brownsville & Matamoros Bridge Company, hereinafter called the Bridge Company, and the Bridge Company's tracks connect, on the Mexican side of the river, with those of the Mexican National Lines. The tracks owned by respondent District are switched by the Port Isabel (R. 138). In consequence, any shipment moving between the Port of Brownsville and Matamoros, or any other point in Mexico reached through Matamoros, must move 7.4 miles over rails operated by the Port Isabel, 2.49 miles over the Trustee's rails, and 1.24 miles over the Bridge Company's rails; thence over the rails of the Mexican National Lines (R. 104). This situation is well described in the opinion of the learned trial judge (R. 58).

The tariffs (R. 125-136) applicable to movements over

*Reference to pages of the Record subsequent to 186 are to the pages of the manuscript record prepared in the Circuit Court of Appeals.

these lines, between Matamoros and the Port of Brownsville, are not joint but several, as alleged in the petition for mandamus (R. 10-11). The Port Isabel has a tariff (R. 125) to which the Trustee and the Bridge Company are not parties. The Trustee has a tariff (R. 128) to which the Port Isabel and the Bridge Company are not parties. And the Bridge Company has a tariff (R. 135) to which the Trustee and the Port Isabel are not parties, although the Trustee was a party thereto prior to May 4, 1936. Therefore, to determine the aggregate charges for the movement of a carload of freight between Matamoros and the Port of Brownsville, there must be added together the separately established charges of the Mexican National Lines, the Bridge Company, the Trustee and the Port Isabel (R. 121).

6. In the situation thus described, respondents seek a writ of mandamus, commanding petitioners to move traffic between Matamoros and the Port of Brownsville, and to furnish equipment and facilities therefor (R. 26). There is no allegation that the Trustee has refused to *transport* respondents' traffic. It is merely alleged that he has refused to *furnish equipment* (R. 17). Obviously, no traffic has been tendered to the Trustee for transportation by respondents, either at the Port of Brownsville or at Matamoros, because the Trustee only operates an intermediate line and has no railroad which directly serves Matamoros or the Port of Brownsville. It is alleged by respondents that the Port Isabel has refused to furnish equipment for the transportation of the traffic mentioned, because it does not own a sufficient supply (R. 10). The proof shows its equipment is limited to one caboose and one water car, and it "owns no serviceable freight equipment whatever" (R. 138). The Mexican National Lines will not allow their equipment to leave the Republic of Mexico (R. 111-112). The Bridge Company and the Port Isabel own no equipment. Therefore, the Trustee, who operates only an intermediate switching line, has been called upon to

furnish all of the equipment needed for the interchange of traffic between points which his rails do not serve directly.

7. Thus the case is not concerned with the construction of a tariff or any provision of a tariff. The case of respondents is grounded on a complaint that petitioners have failed and refused to furnish cars as demanded, and that such refusal is unreasonable and discriminatory. The learned trial judge and Circuit Judge Hutcheson thought that such a case should go to the Interstate Commerce Commission. The majority in the Circuit Court of Appeals have ruled otherwise.

8. The Circuit Court of Appeals in its decision herein (R. 188) decided, in a way probably in conflict with the applicable decisions of this Court, the Federal question whether the complaint of respondents is one over which the Interstate Commerce Commission has primary and exclusive jurisdiction, precluding a resort to the District Court for a writ of mandamus.

9. Petitioners file herewith a certified transcript of the record as required by Rule 38(1); and attach hereto a brief in support of this petition.

WHEREFORE, petitioners jointly and severally pray that in the exercise of its discretion, this Court may issue its writ of certiorari to review the decision herein of the Circuit Court of Appeals, and for such other orders as may be appropriate.

Respectfully submitted,

J. H. TALLICHET,
Attorney for Port Isabel & Rio Grande Valley Railway Company;

ROBERT H. KELLEY,
Attorney for Guy A. Thompson, Trustee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No.....

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, GUY A. THOMPSON, TRUSTEE, AND PORT ISABEL & RIO GRANDE VALLEY RAILWAY COMPANY,
Petitioners,
v.
BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL., *Respondents*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Grounds of Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the JUDICIAL CODE, as amended by the Act of February 13, 1925 (43 Stat. 936), authorizing this Court to issue writs of certiorari to review judgments of the Circuit Courts of Appeals. There was such a judgment here (R. 202), rendered July 15, 1937. In similar circumstances, a petition

for certiorari was granted in DI GIOVANNI v. CAMDEN FIRE INSURANCE COMPANY, 295 U. S. 728.

Statement of the Case

As stated in the Petition for Certiorari, respondents seek a writ of mandamus to compel petitioners to furnish cars for transportation of traffic in both directions between Matamoros, in the Republic of Mexico, and the Port of Brownsville, in the State of Texas.

On movements from the Port of Brownsville, the initial carrier must be the Port Isabel and none other, for it is the only railroad serving the Port. It has no equipment except "one caboose and one water car, but it now owns no serviceable freight equipment whatever." It now has pending before the Interstate Commerce Commission and the Reconstruction Finance Corporation, applications for a loan to enable it to buy some freight equipment, but the respondents "have objected and are yet objecting to all of the proposed loan * * * " (R. 138-139).

In the opposite direction, on traffic to the Port of Brownsville originating at Matamoros, the initial carrier must be the Mexican National Lines, which refuses to permit its equipment to come into this country (R. 112).

The tariffs of petitioners under which this traffic must move, if at all, are *switching* tariffs only (R. 125, 128), and contain no rules, regulations or promises respecting the furnishing of cars. Thus, as said in Judge Hutcheson's dissent, "what is sought is a court decree to compel a connecting carrier having no interest in or concern with a movement, except to perform a switching service, to furnish all cars which may be needed for shipments to Mexico, as to which there is no joint through rate, which do not originate on its lines, and in regard to which it gets no line haul" (R. 200-201); and he might have added that the respondents also seek (R. 26) to have this connecting carrier furnish all the cars required for

movements in the reverse direction, originating at Matamoros.

The proof details the many complex factors entering into the task of supplying various types of cars needed for transportation; the problems constantly arising for solution and the necessity of making frequent changes in plans on short notice (R. 106-116). The problem, therefore, is essentially administrative. No rule or other provision of any tariff was offered in evidence for construction by the Court as to meaning or application. The real complaint is that the refusal to furnish cars as demanded is unreasonable and unjustly discriminatory.

The majority opinion erroneously stated that Lallier and Philen "tendered freight to the appellees who failed to transport it" (R. 191). As stated above; it is physically impossible to tender freight to the Trustee either at Matamoros or the Port of Brownsville, or to the Port Isabel at Matamoros. The majority also fell into error in saying "there is no request or necessity for an order requiring the Missouri Pacific to send its equipment to foreign soil" (R. 195). Obviously, cars cannot be sent to Matamoros for loading or unloading, without entering Mexico. The very essence of the complaint rests on the refusal to furnish cars for movements to and from points in the Republic of Mexico.

The majority in the Circuit Court of Appeals said that respondents "have requested transportation facilities to be furnished *under the regular tariffs* on file" (R. 194). Under what tariff? This record shows no tariff rule or statement that cars will be furnished for these movements.

Reference is also made to the statements contained in the foregoing petition.

Specification of Errors

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

2. The Circuit Court of Appeals erred in holding and deciding that the District Court has jurisdiction to try the cause.

3. The Circuit Court of Appeals erred in holding and deciding that the Interstate Commerce Commission does not have exclusive jurisdiction over the matters complained of by respondents.

4. The Circuit Court of Appeals erred in finding that respondents Lallier and Philen tendered freight to petitioner Trustee, and that he failed to transport it.

5. The Circuit Court of Appeals erred in finding that there is no car shortage and no emergency which renders petitioners unable to comply with the order sought by respondents.

Argument

The District Court, we submit, was clearly right in holding that the complaint should go first to the Interstate Commerce Commission. This is true for two reasons:

First, as stated by MR. JUSTICE BRANDEIS in GREAT NORTHERN RY. CO. v. MERCHANTS' ELEVATOR COMPANY, 259 U. S. 285, the function to be exercised "is in its nature administrative, in contradistinction to judicial * * * . The inquiry is essentially one of fact and of discretion in technical matters * * * reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in a body of experts."

Secondly, the refusal to furnish cars, which may be deemed a rule or practice, is attacked as unreasonable and unjustly discriminatory. The solution of such a question is plainly for the Commission, under TEXAS & PACIFIC RY. CO. v. ABILENE COTTON OIL COMPANY, 204 U. S. 426, for if, without pre-

vious action by the Commission, courts and juries should undertake to determine the reasonableness of petitioners' action, "it would follow that, unless all courts reached an identical conclusion, a uniform standard * * * would be impossible."

In GREAT NORTHERN RY. CO. v. MERCHANTS' ELEVATOR COMPANY, *supra*, this Court said:

> "This action was brought by the Merchants' Elevator Company in a state court of Minnesota against the Great Northern Railway Company and the Director General to recover $80 alleged to have been exacted in violation of the carrier's tariff. That sum had been demanded by the carrier, under Rule 10 of its tariff, as a reconsignment charge at the rate of $5 a car, for 16 cars of corn shipped from points in Iowa and Nebraska to Willmar, Minn., and after inspection there rebilled to Anoka, a station beyond. * * *
>
> "Whether the charge was payable depended solely upon a question of construction; that is, whether the body of the rule or the exception to it applied. On this question there was room for reasonable difference of opinion. The carrier, relying particularly upon Texas & Pacific Ry. Co. v. American Tie & Lumber Co., 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255, and Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43, 36 Sup. Ct. 228, 60 L. Ed. 517, claimed seasonably that until the true construction of the tariff had been determined by the Interstate Commerce Commission, the trial court was without jurisdiction. That court overruled the objection, * * *
>
> "Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is

legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in a body of experts."

This case is much like BALTIMORE & OHIO R. R. Co. v. U. S., 215 U. S. 480, in which MR. CHIEF JUSTICE WHITE, then Associate Justice, said:

"To a consideration of this question it is essential to at once summarily and accurately fix the subject matter of the alleged grievances and the precise character of the relief required in order to remedy the evils complained of upon the assumption of their existence. As to the first, it is patent that the grievances involve acts of the Baltimore & Ohio Railroad, regulations adopted by that company, and alleged dealings by the other corporations, all of which, it is asserted, concern interstate commerce, and all of which, it is alleged, are in direct violation of the duty imposed upon the railroad company by the provisions of the act to regulate commerce. As to the second, in view of the nature and character of the acts assailed, of the prayer for relief which we have previously excerpted, and of the relief which the court below directed to be awarded, it is equally clear that a prohibition, by way of mandamus, against the act is sought, and an order by way of mandamus, was invoked and was allowed, which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of in-

terstate commerce in the future. When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced; at least, until that body, clothed by the statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions."

In further statement of the reasons for the decision, the Court said:

"And the destructive effect upon the system of regulation devised by the act to regulate commerce, which these illustrations show must be the result of construing that act as giving authority to the courts, without the preliminary action of the Commission, to consider and pass upon the administrative questions which the statute has primarily confided to that body, may be greatly multiplied. This is shown by the opinion of the Commission in the Baltimore & Ohio case, to which we have already referred, where the decisions of other lower courts are referred to in conflict with the opinion of the court below in this case as to mine rating, and not in harmony with the views expressed by the Commission in the Baltimore & Ohio case."

The case was reversed and remanded, with instructions to dismiss the petition.

In MORRISDALE COAL CO. v. PENNSYLVANIA RAILROAD CO., 230 U. S. 334, the plaintiff in error brought suit against the railroad for damages occasioned by an unfair distribution of cars to it and an undue allotment of cars to its competitor. The Supreme Court, speaking through MR. JUSTICE LAMAR, after stating the case, said:

"The prohibitions of § 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution

in case of car shortage, and at the time of the transactions out of which this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission. * * *

"In view of the decision in the Abilene, Pitcairn and Robinson cases it is unnecessary again to discuss the statute, or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable.

"The plaintiff, however, seeks to take the case out of the principle of those decisions, insisting that this is a suit for damages occasioned by a violation of the rule; and that, therefore, without any order of the Commission, it is entitled to institute a suit for the recovery of damages resulting from the failure to distribute cars according to the method established by the railroad itself. The record, however, does not sustain this position, for the evidence does not show any breach of the rule or any failure to deliver to the Morrisdale Company all of the cars to which it was entitled under the method of allotment in force between 1900 and 1906. On the contrary, it was admitted at the hearing that there had been no discrimination against the plaintiff in the application of the rule, the complaint being that the basis of allotment was unreasonable, and that all cars in the district should be distributed according to the capacity of the mine, without deducting private cars, foreign fuel cars, or the carrier's own fuel cars. Whether this should be done as a general rule, or under the peculiar conditions prevailing on defendant's road at that time, was, as we have seen, an administrative question, and to be decided by the Commission as preliminary to the right to maintain this suit. The circuit court rightly held that until this was done it had no jurisdiction as a Federal court of the cause of action sought to be enforced."

In PENNSYLVANIA RAILROAD COMPANY v. CLARK BROS. COAL MINING COMPANY, 238 U. S. 456 (opinion by CHIEF JUSTICE HUGHES), it was said:

"This suit was brought in January, 1912, by the Clark Brothers Coal Mining Company (defendant in error) in the court of common pleas of Clearfield County, Pennsylvania, to recover damages for inadequate and unjustly discriminatory car service and supply. The complaint related to the action of the defendant company with respect to cars required for the transportation of coal from plaintiff's mines known as Falcon, Nos. 2, 3 and 4, in Clearfield County, and Falcon Nos. 5 and 6, in Indiana County, Pennsylvania, between October, 1905, and April 30, 1907. A statute of Pennsylvania (Act of June 4, 1883, P. L. 72, 4 Purdons 3906; see.Const. (Pa.) 1873, Art. 17) prohibits undue or unreasonable discrimination by any common carrier 'in charges for or in facilities for the transportation of freight within this State or coming from or going to any other State,' and provides that the carrier guilty of unjust discrimination shall be liable 'for damages treble the amount of injury suffered.'

"On behalf of the defendant (plaintiff in error) the jurisdiction of the court to entertain the action was challenged upon the ground that, with respect to car distribution, the defendant was subject to the act to regulate commerce, and that the claim of the plaintiff was cognizable only by the Interstate Commerce Commission or by the courts of the United States. * * *

"The question whether the rule or method of car distribution practiced by the railroad company as unjustly discriminatory was one which the Commission had authority to pass upon. * * * Further, by reason of the nature of the question involved in an attack upon the rule or method of the company in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule."

In MITCHELL COAL & COKE COMPANY v. PENNSYLVANIA RAILROAD COMPANY, 230 U. S. 247, the following question was certified to the Supreme Court:

" 'Has the circuit court of the United States, in ad-

vance of any application to the Interstate Commerce Commission and action thereon by that body, jurisdiction to entertain an action of trespass brought by a shipper of coal and coke, to recover damages because of the alleged unlawful preferential rates accorded to other and competing shippers of coal and coke, when such alleged preferential rates are claimed to have resulted from payments made to such other shippers, which payments the plaintiff claimed were rebates from the published and filed freight rates, and the defendant claimed were made as compensation for services rendered by such shippers or for other accounts which justified it in making the same, and when it further appeared that such payments had been made pursuant to a practice of long standing, and that a number of shippers other than the plaintiff were interested in the question of the lawfulness thereof,' "

The court said (opinion by MR. JUSTICE LAMAR):

"The necessity under the statute of having such questions settled by a single tribunal in order to secure singleness of practice and uniformity of rate has been pointed out and settled in Abilene, Pitcairn and Robinson cases, and is referred to here because this record and that in Pennsylvania R. Co. v. International Coal Min. Co., just decided (230 U. S. 184, 57 L. Ed., 33 Sup. Ct. 893) furnish a striking illustration of the results which would follow if the reasonableness of an allowance could be decided by different tribunals. Both cases involve the payment of 18 cents a ton to the Altoona Company during the same period and for identically the same reasons. In both the plaintiff insisted that the payment was a rebate, and the carrier that it was compensation for services rendered. In the International case the judge treated the Altoona allowance as lawful and reasonable. In this case the referee found that it was a rebate, while the trial judge, in passing on exceptions to the report, held that it was a question of fact about which the evidence was

conflicting, and thereupon approved the referee's report. Treating it as a question of fact, there may have been sufficient testimony to sustain the finding in both instances, although the conclusion was diametrically opposite. And, applying the rule that appellate courts will not disturb findings of fact where the evidence is conflicting, contradictory judgments might have been affirmed, and one plaintiff could have been awarded damages on the theory that the Altoona allowance was unlawful, and the other been mulcted in cost because the Altoona allowance was legal. This and like considerations compelled the holding that, as the courts have no primary jurisdiction to fix rates, neither can they do so at the suit of a single plaintiff who claims to have been damaged because an allowance paid its competitors was unreasonable in amount.

"It is argued that this conclusion ignores §§ 9 and 22, which give the shipper the option of suing in the courts or applying to the Commission. The same argument was made and answered in the Abilene case by showing that to permit suits based on the charge that a particular practice was unreasonable, without previous action by the Commission, would repeal the many provisions of the statute requiring uniformity and equality. For, manifestly, such uniformity and equality cannot be secured by separate suits before separate tribunals, involving the reasonableness of a rate or practice. The evidence might vary, and, of course, the verdicts would vary; with the result that one shipper would succeed before one jury and another fail before a different jury, where the reasonableness of the same practice was involved. Manifestly, different verdicts would occasion inequality between the two shippers, and it is equally manifest that if the Commission had made one order of which both could avail themselves, there would have been one finding, of which one, two, or a score of shippers could equally avail themselves. The claim that this conclusion nullifies § 9 is concretely answered by the fact that the court has just decided to the contrary in Pennsylvania R. Co. v. International Coal Min. Co. There the carrier insisted that a suit for damages occasioned by rebating could not be

maintained without preliminary action by the Commission. This contention was overruled, and it was held, that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the Commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices, there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission, and not the courts, should pass upon that administrative question. When such order is made, it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case—thereby giving every shipper equal rights and preserving uniformity of practice."

In LOOMIS v. LEHIGH VALLEY R. R. Co., 240 U. S. 43, 36 Sup. Ct. 228 (opinion by MR. JUSTICE MCREYNOLDS), the court said:

"Plaintiffs in error have long been shippers of grain and produce over the line of defendant carrier from Victor and other stations in Western New York. From time to time during a period beginning in August, 1906, and ending May 6, 1908, they requested it to furnish at such places for their use one or more cars—about two hundred altogether—suitable for transporting in bulk, wheat, oats, rye, apples, cabbages, and potatoes. In response, it sent ordinary box and refrigerator cars inadequate for the required service until fitted with inside doors or transverse bulkheads. Prior to 1906, in like circumstances, the custom was for the railroad to supply lumber without charge and shippers constructed these temporary fittings. This practice was discontinued at the stations mentioned, and, during the period specified, it refused either to supply such material or cars completely prepared for carrying in bulk the enumerated articles. Plaintiffs were therefore compelled to construct inside doors or bulkheads in

the cars which they loaded and delivered to defendant for transportation to points both within and beyond the state. The total cost of material used was $322.07—it varied from 40 cents to $3.50 per car.

"Payment of the amount so expended was demanded by plaintiffs and refused. Without preliminary resort to the Interstate Commerce Commission, they then brought this action in a State court upon the theory that the carrier having failed to perform its common-law duty to furnish adequate cars, they were entitled to recover as damages their consequent outlay. * * *

"Speaking through Mr. Justice Lamar in Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. *supra,* we said (p. 255):

" 'The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute.'

"In the Minnesota Rate Cases, 230 U. S. *supra,* we further said (p. 419): 'The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it could be destructive of the system of regulation defined by the statute if the court, without the preliminary action of the Commission, were to undertake to pass upon the administrative questions which the statute has primarily confided to it.'

"And in Texas & P. R. Co. v. American Tie & Timber Co., 234 U. S. *supra,* the rule was thus stated (p. 146): 'It is equally clear that the controversy as to whether the lumber tariff included cross-ties was one primarily to be determined by the Commission in the exercise of its

power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that, for the preservation of the uniformity which it was the purpose of the act to regulate commerce to secure, the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission.'

"An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 220, 58 L. Ed. 199, 576, 34 Sup. Ct. Rep. 291. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See Pennsylvania R. Co. v. Puritan Coal Min. Co., 237 U. S. pp. 128, 129, 59 L. Ed. 871, 872, 35 Sup. Ct. Rep. 484; Pennsylvania R. Co. v. Clark Bros. Coal Min. Co., 238 U. S. pp. 469, 470, 59 L. Ed. 1412, 35 Sup. Ct. Rep. 896.

"If, in respect to interstate business, the courts of New York may determine, as original matters, rate-making problems, those in other States have like jurisdiction. The uncertainty and confusion which would necessarily result is manifest. Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted."

TEXAS & PACIFIC RY. CO. v. ABILENE COTTON OIL COM-

PANY, *supra*, is so familiar to the Court that a restatement of the facts is unnecessary. The following quotation, however, from the opinion, is directly applicable to the question now presented:

> "When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because, unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for *if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission*, finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief from the basis that the established rate was unreasonable, in the opinion of a court and jury, and *thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced*. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For *if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless*

all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. *Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy would be successfully inflicted. Indeed, no reason can be perceived for the enactment, of the provision endowing the administrative* tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, *if the power was left in court to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission* in the premises. This must be, because, *if the power existed in both courts and the Commission* to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible." (Italics ours.)

The majority in the Circuit Court of Appeals said "there is no car shortage and no emergency which renders the carriers unable to comply with" a writ of mandamus (R. 195). The record furnishes no adequate foundation for that statement. The hearing at which the only record evidence was taken was confined to petitioners' pleas to the jurisdiction of the court (R. 71). There has been no pleading or hearing on the merits. If that should ever become necessary, it will then be disclosed whether a car shortage exists. Whether it exists at a particular moment may be irrelevant. From past experience the Court may well assume that if the writ of mandamus should issue, a car shortage probably would occur while the writ remained in force; and in such a situation the outstanding writ would preclude prompt administrative action by the Commission or executive action by the carriers. Thus, the very error into which the majority have fallen discloses the essential need for administrative action and the impropriety of a writ of mandamus.

A writ of mandamus commanding the Port Isabel to furnish cars would be vain, because it owns none. The writ must first require it to procure some; but an order to require a carrier to supply itself with cars, involving as it does corporate finances, the price of equipment, the types of cars needed, and other technical matters, is essentially one for the Commission, under Section 1 of the Interstate Commerce Act (U. S. C. A., Title 49, Section 1).

In the majority opinion of the Circuit Court of Appeals, it is said:

> "It is true that the carriers in this case have published no joint through rate, but it is admitted that they are connecting carriers; that the commerce which appellants seek to have transported over appellees' joint lines is a through movement between the Port of Brownsville and the interchange with the National Railways of Mexico; and that both of the appellees have promulgated

> and filed with the Commission tariffs naming per car charges for such through transportation."

The carriers are required to publish reasonable rates from and to the border, and the jurisdiction of the Interstate Commerce Commission or of the courts applies to international commerce only insofar as the transportation takes place within the United States. LEWIS-SIMAS-JONES CO. v. SOUTHERN PACIFIC CO., 283 U. S. 654. As a corollary thereto, the movement covered by the tariffs in question is not a part of a through movement between the Port of Brownsville and a point on the lines of the National Railways of Mexico; but on the contrary is and can be solely a switching movement within the territorial limits of the United States. If the quoted statement were true, petitioners could be compelled to establish through routes and rates between a point in the United States and a point in the Republic of Mexico. That such is not the law is shown in LEWIS-SIMAS-JONES CO. v. SOUTHERN PACIFIC CO., *supra.*

Even where carriers join in establishing through routes and joint rates, intermediate carriers have never been required to furnish more than a ratable or proportionate number of cars. HUERFANO COAL CO. v. COLORADO & SOUTHEASTERN R. R. CO., ET AL., 28 I. C. C. 502; LUMBER RATES THROUGH OHIO RIVER CROSSINGS, 29 I. C. C. 38; CAMPBELL'S CREEK COAL CO. v. ANN ARBOR R. CO., ET AL., 33 I. C. C. 558. But see, IN RE HANDLING OF FRESH MEAT, 132 I. C. C. 49, in which the Interstate Commerce Commission said:

> "A shipper served by a switching line ordinarily makes request of that line for cars, but the carrier receiving the road haul is commonly looked to eventually to furnish cars, and respondent's freight traffic manager so testified."

What would be a ratable or reasonable number of cars under all the surrounding transportation circumstances would clearly be a question for the Commission rather than the

courts. So, even in the case of through routes and joint rates, the question would be administrative rather than judicial. Much more so is this true, when, as here, there is no through route, but only a combination of *separately established switching charges.*

In EX PARTE BALDWIN, ET AL., 291 U. S. 610, mandamus was refused because a remedy existed by injunction. Here an administrative remedy appears on the face of the complaint.

The issuance of the writ of certiorari in this case seems to us to be highly appropriate. Under applicable decisions of this Court, heretofore cited, the learned trial judge and CIRCUIT JUDGE HUTCHESON seem to us to have reached a correct conclusion, and CIRCUIT JUDGES FOSTER and HOLMES appear to be clearly wrong. If the writ be refused, the District Court must feel bound by the decision in the Circuit Court of Appeals, and must enter upon a long and tedious hearing to solve problems essentially legislative, technical and administrative in their nature; and would probably feel bound, by reason of the language of the majority opinion, to issue a writ of mandamus unless the proof showed the existence of a shortage of cars. In the end, the case would come again to this Court for its determination of the very question now presented.

There is something inherently wrong in a demand that an American railroad, operating an intermediate switching line and enjoying no substantial revenue from the transaction, should be required to furnish all of the equipment for the movement of international traffic, when the Mexican railroads, the real beneficiaries of the movement, are unwilling to furnish any part of the rolling stock, and when the court which is called upon to enter the order must direct that American railroad, in order to comply with the demand, to send its property out of the jurisdiction of this and every other court of the United States, where it will be subjected to the vicissitudes of a foreign jurisprudence.

We respectfully ask that a writ of certiorari issue to review the decision of the Circuit Court of Appeals.

J. H. TALLICHET,
Attorney for Port Isabel & Rio Grande Valley Railway Company;

ROBERT H. KELLEY,
Attorney for Guy A. Thompson, Trustee.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 300

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, GUY A. THOMPSON, TRUSTEE, ET AL., *Petitioners,*

v.

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL., *Respondents*

BRIEF FOR PETITIONERS

JOHN P. BULLINGTON,
Attorney for Port Isabel & Rio Grande Valley Railway Company;

ROBERT H. KELLEY,
Attorney for Guy A. Thompson, Trustee

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Petitioners,
v.
BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL., *Respondents*

BRIEF FOR PETITIONERS

The Opinions Below

The opinion of the District Court does not appear to have been reported. The opinions delivered in the Circuit Court of Appeals are reported in BROWNSVILLE NAV. DIST., ET AL., v. ST. LOUIS B. & M. RY. CO., ET AL., 91 Fed. (2d) 502.

Grounds of Jurisdiction

Petitioners submit that this Court has jurisdiction of this cause on the following grounds:

1. Section 240 of the JUDICIAL CODE, as amended by the Act of February 13, 1925 (43 Stat. 936), reads in part:

> "Sec. 240 (a) In any case, civil or criminal, in a circuit court of appeals * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, * * * to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it, with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

This cause having been instituted in the District Court of the United States for the Southern District of Texas (R. 2), was appealed to the Circuit Court of Appeals for the Fifth Circuit (R. 43, 45, 46); was there decided July 15, 1937 (R. 152), and thereafter, on application of petitioners, this Court allowed certiorari.

2. Respondents, a navigation district organized under the laws of Texas and two individuals engaged in business as freight brokers and forwarders and as stevedores, sued petitioners, carriers by railroad subject to the Interstate Commerce Act (49 U. S. C. A., Section 1, et seq.), seeking a writ of mandamus to compel Petitioners to move traffic between Matamoros, Mexico, and the Port of Brownsville, Texas (about seven miles from the City of Brownsville), and to furnish equipment and facilities therefor, claiming (R. 2-19) that the duty to do so exists under the Interstate Commerce Act (49 U. S. C. A., Sec. 1 (4), 1 (11), 6).

Petitioners contended that the matters involved fell within the primary and exclusive jurisdiction of the Interstate Commerce Commission (R. 25, 32). The District Court, after hearing evidence (R. 46-139), sustained their contention (R. 39), and dismissed the petition (R. 42). With CIRCUIT JUDGE HUTCHESON dissenting (R. 148), the Circuit Court

of Appeals held (R. 141) that the District Court had jurisdiction to grant the writ of mandamus, reversed the judgment of the District Court and remanded the cause for trial (R. 152).

In view of the foregoing, it seems to us that this Court clearly has jurisdiction, and that the judgment of the Circuit Court of Appeals is properly here, subject to revision by this Court.

Statement of the Case

As shown by the map (R. 70-a), the respondent District owns the only tracks serving the turning basin and wharves of the Port of Brownsville. These tracks connect with those of petitioner, Port Isabel & Rio Grande Valley Railway Company, hereinafter called the Port Isabel. The tracks of the latter connect, in the City of Brownsville, with those of petitioner, Trustee. The Trustee's tracks connect with those of Brownsville & Matamoros Bridge Company, hereinafter called the Bridge Company, whose stock is owned in equal shares by the Trustee and the Mexican National Lines (R. 84). Finally, the Bridge Company's tracks connect, on the Mexican side of the Rio Grande, with those of the Mexican National Lines. The tracks owned by the District are switched by the Port Isabel (R. 99). Therefore, any shipment moving by rail between the Port of Brownsville and Matamoros or any other point in Mexico reached through Matamoros, must move 7.4 miles over rails operated by the Port Isabel; 2.49 miles over the Trustee's rails; 1.24 miles over the Bridge Company's rails. and also over the rails of the Mexican National Lines (R. 70). The learned trial judge well described the situation (R. 39). With respect to all such shipments, petitioner Trustee must always be an *intermediate* carrier, and can never be either the initial or delivering carrier, because his rails do not reach either Matamoros or the Port of Brownsville.

In the situation thus described, respondents sought a writ

of mandamus to compel petitioners to move traffic between Matamoros and the Port of Brownsville, and to furnish equipment and facilities therefor (R. 19), claiming that a duty to do so exists under the Interstate Commerce Act (49 U. S. C. A., Sec. 1 (4), 1 (11), 6).

Respondents, among other things alleged:

> "Said Respondent, Missouri Pacific (the Trustee), operates within Brownsville a depot and terminal facilities for the handling of the local traffic, for switching and other terminal services." (R. 6).
>
> "In order to move the traffic from the turning basin at the Port of Brownsville to uptown Brownsville and to a connection with the railways of Mexico serving Matamoros, it is necessary to use the joint service of both respondents" (R. 7).
>
> " * * * respondent Missouri Pacific lines has refused and declined to furnish equipment to respondent Port Isabel Railway for the purpose of moving the traffic that is now available for transportation from the Port of Brownsville to Matamoros * * * (R. 9).
>
> " * * * particularly is respondent, Missouri Pacific lines handling traffic under tariffs and charges similar to that herein described at Laredo, Texas, for the interchange and switching of traffic between Laredo in the State of Texas, and Nuevo Laredo * * * Tamaulipas, Mexico" (R. 10).
>
> "Heretofore at all times in the past and at the present time, respondent Missouri Pacific lines has furnished equipment, box cars, flat cars and gondola cars for the interchange of traffic coming from old Mexico into the United States through the various gateways, including Brownsville, Texas" (R. 10).
>
> "Respondent Missouri Pacific Lines, has heretofore at all times in the past and is now at the present time, furnishing its equipment for the transportation of all commodities from the ports of Corpus Christi and Houston, Texas, to various gateways including Laredo and Browns-

ville, Texas, for interchange with the national railways of Mexico, for transportation into old Mexico * * * " (R. 10).

" * * * subsequent to May 16, 1936, and after the opening of the Port of Brownsville, respondent Missouri Pacific lines refused and declined and is now refusing and declining to furnish the necessary equipment for the movement of the traffic through Brownsville * * * " (R. 12).

" * * * said respon nt Missouri Pacific lines has acted with a deliberate design for the purpose of diverting the tonnage from the Port of Brownsville to other gateways * * * (R. 14).

" * * * respondents are denying to the Port of Brownsville and the petitioners herein equal opportunity to move their traffic under interstate rates and charges lawfully on file with the Interstate Commerce Commission for the express purpose and design of diverting the traffic from the Port of Brownsville to other ports and other gateways. It is further specifically alleged that respondent Missouri Pacific lines is furnishing the equipment and permitting the traffic to move through other gateways and other ports * * * " (R. 17).

" * * * respondent Missouri Pacific lines will furnish the necessary equipment and facilities for the movement of the identical traffic here involved via Corpus Christi and Laredo to Mexico and from Mexico via Laredo to Corpus Christi, and at the same time said respondent is refusing and declining and has refused and declined to furnish equipment and facilities for the transportation of the same identical commodities through Brownsville and Matamoros to and from the same origins and destinations in the nation of old Mexico" (R. 19).

" * * * the acts of respondents herein described are preventing them (appellants) from having interstate traffic moved by common carriers * * * at the same rates and charges and under the same terms and conditions under which respondents are transporting the identical traffic for other shippers and other gateways" (R. 19).

The respondents did *not* allege that the Trustee had re-

fused to *transport* their traffic; but merely that he had refused to *furnish equipment* (R. 12). They alleged that the Port Isabel had refused to furnish equipment for the transportation of this international traffic because it does not own a sufficient supply (R. 7). Its equipment, according to the proof, is limited to one caboose and one water car, and it "owns no serviceable freight equipment whatever" (R. 100). The Mexican National Lines will not allow their equipment to leave the Republic of Mexico (R. 75).

The American tariffs applicable to movements over the route above described, between Matamoros and the Port of Brownsville, published by the Port Isabel, the Trustee and the Bridge Company, respectively, are *several but not joint* (R. 87, 90, 97), although the Trustee was a party to the Bridge Company's tariff prior to May 4, 1936. Consequently, to determine the aggregate charges for the movement of a carload of freight between Matamoros or other Mexican points and the Port of Brownsville, there must be added together the separately established charges of the Mexican National Lines, the Bridge Company, the Trustee and the Port Isabel (R. 83).

Thus, the case is not concerned with the construction of a tariff or of any provision of a tariff. Respondents contend that petitioners have failed and refused to furnish cars as demanded; that the Interstate Commerce Act imposes upon them the duty to furnish such cars as demanded, and that such refusal is unreasonable and discriminatory. The tariffs of petitioners under which the traffic must move, if at all, are *switching tariffs only* (R. 87, 90), and contain no rules, regulations or promises respecting the furnishing of cars.

On movements from the Port of Brownsville, the initial carrier must be the Port Isabel and none other, for it is the only railroad serving the port. But it has no serviceable freight equipment (R. 100). It now has pending before the Interstate Commerce Commission and the Reconstruction Finance Corporation, applications for a loan to enable it to buy some

freight equipment, but the respondents "have objected and are yet objecting to all of the proposed loan" (R. 100).

In the opposite direction, on traffic originating in Mexico, destined to the Port of Brownsville, the initial carrier must be the Mexican National Lines, but it refuses to permit its equipment to leave the Republic of Mexico (R. 75).

The majority in the Circuit Court of Appeals erroneously stated that respondents Lallier and Philen, "tendered freight to the appellees, who failed to transport it" (R. 144). As stated above, it is impossible to tender freight to the Trustee, at either Matamoros or the Port of Brownsville, or to the Port Isabel at Matamoros. The majority also fell into error in saying, "There is no request or necessity for an order requiring the Missouri Pacific (the Trustee) to send its equipment to foreign soil" (R. 147). Obviously, cars cannot be sent to Matamoros or any other point in Mexico, for loading or unloading without their being sent "to foreign soil." The very essence of the complaint rests on the refusal to furnish cars to carry shipments to and from points in Mexico. The majority opinion also states that respondents "have requested transportation facilities to be furnished *under the regular tariffs* on file (R. 146). The record contains, in full, "the regular tariffs on file." Neither the majority in the Circuit Court of Appeals nor the respondents have pointed out any rule or statement in any of these tariffs providing that cars will be furnished for the movements here involved. There is no such provision (R. 87-98), and the tariffs published by petitioners apply only to transportation *between points in the United States.*

In essence, the case boils down to this:

A writ of mandamus, commanding the Port Isabel to furnish cars would be vain, because it owns none. The writ must first require it to procure some; but an order requiring a carrier to supply itself with cars, involving, as it does, corporate finances, the price of equipment, the type of cars

needed, the number of each kind, and other technical matters, is essentially an administrative matter for the Interstate Commerce Commission, under paragraphs (4) and (10) to (17) of Section 1 of the INTERSTATE COMMERCE ACT (49 U. S. C. A. 1).

So far as concerns the Trustee, JUDGE HUTCHESON described the case in his dissenting opinion, when he said: "What is sought is a court decree to compel a connecting carrier, having no interest in or concern with a movement except to perform a switching service, to furnish all cars which may be needed for shipment to Mexico, as to which there is no joint through rate, which do not originate on its lines, and in regard to which it gets no line haul" (R. 152). He might have added that respondents also seek to have this intermediate carrier furnish all the cars required for movements in the reverse direction, originating in Mexico.

The proof details many of the complex factors entering into the task of supplying various types of cars needed for transportation; the problems constantly arising for solution and the necessity of making frequent changes in plans on short notice (R. 71-80). The problem, therefore, is essentially administrative. As stated above, no rule or other provision of any tariff was offered in evidence for construction by the Court, as to meaning or application. The real complaint is that the refusal to furnish cars, as demanded, is unreasonable and unjustly discriminatory.

Specification of Errors

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

2. The Circuit Court of Appeals erred in holding and deciding that the District Court has jurisdiction to try the cause.

3. The Circuit Court of Appeals erred in holding and de-

ciding that the Interstate Commerce Commission does not have exclusive jurisdiction over the matters complained of by respondents.

4. The Circuit Court of Appeals erred in finding that respondents Lallier and Philen tendered freight to petitioner Trustee, and that he failed to transport it.

5. The Circuit Court of Appeals erred in finding that there is no car shortage and no emergency which renders petitioners unable to comply with the order sought by respondents.

Argument

1. *If the matters of discrimination and joint through rates and routes be laid aside, as here they must be, the Interstate Commerce Act does not require carriers subject thereto to send their equipment into a foreign country.*

Section 1 of the Act (49 Stat. L. 543) reads, in part, as follows:

> "(1) That the provisions of this part (I) shall apply to common carriers engaged in—
>
> "(a) The transportation of passengers or property wholly by railroad * * *
>
> " * * * from or to any place in the United States to or from a foreign country, *but only in so far as such transportation takes place within the United States.*" (Italics ours.)

The emphasized portion of the statute is a clear limitation on all that follows, and was recognized as such in NEWS SYNDICATE CO. v. NEW YORK CENTRAL R. CO., 275 U. S. 179, and LEWIS-SIMAS-JONES CO. v. SOUTHERN PACIFIC CO., 283 U. S. 654.

In the cases cited the court held that where joint through rates were published from a point in a foreign country to a

point in the United States, and no proportional rate was published for that part of the movement occurring within the United States, the Interstate Commerce Commission had power to determine the reasonableness of the through rate, and to award reparation against the American carriers, as joint tortfeasors, to the extent the through rate was found to be unreasonable.

From these decisions it might, in a proper case, be argued by analogy, that *if there were* joint through rates in existence, between the Port of Brownsville and Matamoros or other points in Mexico, the participating carriers would be under the same legal duty to furnish equipment for the transportation to which such rates applied as they would be in respect of traffic moving on rates between points in Texas and points in other States. But that argument cannot be made here. Neither the Trustee, the Bridge Company, nor the Mexican Lines has joined or concurred in the tariff of the Port Isabel (R. 87). Likewise, the tariffs of the Trustee (R. 90) and the Bridge Company (R. 97) are several rather than joint. The Mexican tariffs, which include an additional charge for movement between Matamoros and the point of interchange with the Bridge Company, are not included in the record; but they also show separately established charges (R. 83). There being no through route or joint rate, but merely a combination of local switching rates, applying, so far as petitioners are concerned, only to transportation within the United States, we are unable to perceive how the above quoted limitation, contained in paragraph (1) of Section 1 of the Act, can be avoided, even by analogy to the cases cited.

If a discrimination should exist, as alleged in the petition for mandamus (R. 10-19), by reason of the furnishing of such equipment at one gateway and not at another, it might well be within the power of the *Interstate Commerce Commission* to find that the discrimination is unjust, and order it re-

moved.* GREAT NORTHERN RY. v. MERCHANTS' ELEVATOR CO., 259 U. S. 285, 291; WESTERN & A. R. R. v. GEORGIA, ETC., COMMISSION, 267 U. S. 493, 497, 498. But that would be the exercise of an *administrative* power by the Commission, which no court may exercise by mandamus. And even in such cases, the Commission would probably be limited to an order directing the removal of the discrimination, leaving to the carriers the alternative to furnish the equipment at both places, or at neither. WESTERN & A. R. R. v. GEORGIA, ETC., COMMISSION, *supra;* TEXAS & P. RY. CO. v. UNITED STATES, 289 U. S. 627, 650.

In view, therefore, of the quoted restriction which paragraph (1) of Section 1 of the Act places on its remaining provisions, petitioners submit that the alleged legal duty, which respondents would have enforced by mandamus, does not exist; and that if a remedy exist the Commission is the proper forum.

2. *The questions arising in this case being essentially administrative, resort must first be had to the Interstate Commerce Commission.*

The District Court was clearly right in holding that the complaint should go first to the Interstate Commerce Commission. This is true for two reasons:

First, the function to be exercised "is in its nature administrative, in contradistinction to judicial * * * . The inquiry is essentially one of fact and of discretion in technical matters * * * reached ordinarily upon voluminous and conflicting

*By a report and order (still unreported) in **Brownsville Nav. Dist., et al., v. The St. Louis B. & M. Ry. Co., et al.,** Docket No. 27,691, dated November 2, 1937, the Commission did in fact pass on the questions of discrimination; stated that the complaint had been filed with it March 30, 1937 (ten days after the appeal from the District Court in this case had been perfected); found that discrimination existed in only one of several respects alleged; ordered it, in that respect, removed, and reserved for future determination the charges that other sections of the Act had been violated. It expressly referred to the pendency of this case in this Court.

evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts." GREAT NORTHERN RY. CO. v. MERCHANTS' ELEVATOR COMPANY, 259 U. S. 285.

Second, the refusal to furnish cars, which may be deemed to be a rule, practice or regulation, is attacked as unreasonable and unjustly discriminatory. The determination of such a question plainly lies with the Commission. TEXAS & PACIFIC RY. CO. v. ABILENE COTTON OIL COMPANY, 204 U. S. 426. If, without previous action by the Commission, courts and juries should undertake to determine the reasonableness of petitioners' action, "it would follow that, unless all courts reached an identical conclusion, a uniform standard * * * would be impossible."

GREAT NORTHERN RY. CO. v. MERCHANTS' ELEVATOR COMPANY, *supra,* was a suit brought by the elevator company in a State court against the Great Northern Railway Company and the Director General to recover an amount said to have been exacted in violation of a published tariff. Whether the charge was payable depended upon a question of construction, that is whether the body of a tariff rule applied, or an exception to the rule. On this question the court said there was room for reasonable difference of opinion. The carrier claimed that until the true construction of the tariff had been determined by the Interstate Commerce Commission, the trial court was without jurisdiction. This Court said:

> "Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative, in contradistinction to judicial. But, ordinarily, the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule, or practice

> shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

In the present case, "the inquiry is essentially one of fact and one of discretion in technical matters." The right of respondents to a supply of cars for the movement of their traffic is by no means absolute. At best, they are members of the shipping public and have no greater right to the available supply than other shippers in like circumstances. The circumstances, including the supply of each kind of cars available and the necessities of other shippers, must always be determined in the light of conditions existing at the time the demand is made. The complexity of the factors which must be taken into consideration in passing upon the reasonableness of a demand for cars was shown by the testimony of the witness Levy (*infra*, pp. 27-29).

Consideration must be given, when each demand is made, to the number and type of cars demanded; the requirements of other shippers for like cars at different points of origin; the prior right of shippers of perishables; the length of time the equipment demanded will be engaged in the service for which the demand is made; the location of the points where it will be released, and perhaps to other matters, "for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable."

This case is much like BALTIMORE & OHIO R. R. Co. v. U. S., 215 U. S. 481, in which MR. CHIEF JUSTICE WHITE, then Associate Justice, said:

> "To a consideration of this question it is essential to at once summarily and accurately fix the subject matter of the alleged grievances and the precise character of the relief, required in order to remedy the evils complained of upon the assumption of their existence. As to the first, it is patent that the grievances involved acts of the Baltimore & Ohio Railroad, regulations adopted by that company, and alleged dealings by the other corporations, all of which, it is asserted, concern interstate commerce, and all of which, it is alleged, are in direct violation of the duty imposed upon the railroad company by the provisions of the act to regulate commerce. As to the second, in view of the nature and character of the acts assailed, of the prayer for relief which we have previously excerpted, and of the relief which the court below directed to be awarded, it is equally clear that a prohibition, by way of mandamus, against the act, is sought, and an order, by way of mandamus, was invoked and was allowed, which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of interstate commerce in the future. When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced; at least, until that body, clothed by the statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions."

In further statement of the reasons for the decision, the Court said:

> "And the destructive effect upon the system of regulation devised by the act to regulate commerce, which

> these illustrations show must be the result of construing that act as giving authority to the courts, without the preliminary action of the Commission, to consider and pass upon the administrative questions which the statute has primarily confided to that body, may be greatly multiplied. This is shown by the opinion of the Commission in the Baltimore & Ohio case, to which we have already referred, where the decisions of other lower courts are referred to in conflict with the opinion of the court below in this case as to mine rating, and not in harmony with the views expressed by the Commission in the Baltimore & Ohio case."

The case was reversed and remanded, with instructions to dismiss the petition.

In MORRISDALE COAL CO. v. PENNSYLVANIA RAILROAD Co., 230 U. S. 304, the plaintiff in error brought suit against the railroad for damages occasioned by an unfair distribution of cars to it and an undue allotment of cars to its competitor. The Supreme Court, speaking through MR. JUSTICE LAMAR, after stating the case, said:

> "The prohibitions of § 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution in case of car shortage, and at the time of the transactions out of which this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission. * * * "

At this point, attention may be directed to the fact that here also "no general rule has been adopted by the carriers or promulgated by the Commission." Apparently the respondents seek here to have the court, by a writ of mandamus, promulgate, at least for themselves, a special rule of car distribution. Continuing, the court said further:

> "In view of the decision in the Abilene, Pitcairn, and

Robinson cases it is unnecessary again to discuss the statute, or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable.

"The plaintiff, however, seeks to take the case out of the principle of those decisions, insisting that this is a suit for damages occasioned by a violation of the rule; and that, therefore, without any order of the Commission, it is entitled to institute a suit for the recovery of damages resulting from the failure to distribute cars according to the method established by the railroad itself. The record, however, does not sustain this position, for the evidence does not show any breach of the rule or any failure to deliver to the Morrisdale Company all of the cars to which it was entitled under the method of allotment in force between 1900 and 1906. On the contrary, it was admitted at the hearing that there had been no discrimination against the plaintiff in the application of the rule, the complaint being that the basis of allotment was unreasonable, and that *all cars in the district* should be distributed according to the capacity of the mine, without deducting private cars, foreign fuel cars, or the carrier's own fuel cars. Whether this should be done as a general rule, or under the peculiar conditions prevailing on defendant's road at that time, was, as we have seen, an administrative question, and to be decided by the Commission as preliminary to the right to maintain this suit. The circuit court rightly held that until this was done it had no jurisdiction as a Federal court of the cause of action sought to be enforced."

In PENNSYLVANIA RAILROAD COMPANY v. CLARK BROS. COAL MINING COMPANY, 238 U. S. 456 (opinion by CHIEF JUSTICE, then Associate Justice, HUGHES) it was said:

"This suit was brought in January, 1912, by the Clark Brothers Coal Mining Company (defendant in error) in the court of common pleas of Clearfield County, Pennsylvania, to recover damages for inadequate and un-

justly discriminatory car service and supply. The complaint related to the action of the defendant company with respect to cars required for the transportation of coal from plaintiff's mines known as Falcon, Nos. 2, 3, and 4, in Clearfield County, and Falcon, Nos. 5 and 6, in Indiana County, Pennsylvania, between October, 1905, and April 30, 1907. A statute of Pennsylvania (Act of June 4, 1883, P. L. 72, 4 Purdons 3906; see Const. (Pa.) 1873, Art. 17) prohibits undue or unreasonable discrimination by any common carrier 'in charges for or in facilities for the transportation of freight within this State or coming from or going to any other State,' and provides that the carrier guilty of unjust discrimination shall be liable 'for damages treble the amount of injury suffered.'

"On behalf of the defendant (plaintiff in error) the jurisdiction of the court to entertain the action was challenged upon the ground that, with respect to car distribution, the defendant was subject to the act to regulate commerce, and that the claim of the plaintiff was cognizable only by the Interstate Commerce Commission or by the courts of the United States. * * *

"The question whether the rule or method of car distribution practiced by the railroad company as unjustly discriminatory was one which the Commission had authority to pass upon. * * * Further, by reason of the nature of the question involved in an attack upon the rule or method of the company in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule."

Whether at any time, under the circumstances then existing, an intermediate switching carrier, serving neither point of origin nor point of destination, and securing no line haul on a movement, should be required to furnish *all* of the equipment for that movement, the primary benefit of which is enjoyed by a foreign railroad which refuses to permit its

equipment to enter this country for loading or unloading, seems to us to render the question essentially one of administration.

TEXAS & PACIFIC RY. CO. v. ABILENE COTTON OIL CO., *supra*, is so familiar to the Court that a restatement of the facts is unnecessary. However, the following quotation from the opinion is so directly applicable to the questions here involved that it is given for the convenience of the Court:

> "When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because, unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for *if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission,* finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief from the basis that the established rate was unreasonable, in the opinion of a court and jury, and *thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced.* This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recog-

nition of the right asserted. For *if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible,* as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. *Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision* endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, *if the power was left in court to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission* in the premises. This must be, because, *if the power existed in both courts and the Commission* to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by

a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible." (Italics ours.)

In MITCHELL COAL & COKE COMPANY v. PENNSYLVANIA RAILROAD COMPANY, 230 U. S. 247, the following question was certified to the Supreme Court:

> " 'Has the circuit court of the United States, in advance of any application to the Interstate Commerce Commission and action thereon by that body, jurisdiction to entertain an action of trespass brought by a shipper of coal and coke, to recover damages because of the alleged unlawful preferential rates accorded to other and competing shippers of coal and coke, when such alleged preferential rates are claimed to have resulted from payments made to such other shippers, which payments the plaintiff claimed were rebates from the published and filed freight rate, and the defendant claimed were made as compensation for services rendered by such shippers or for other accounts which justified it in making the same, and when it further appeared that such payments had been made pursuant to a practice of long standing, and that a number of shippers other than the plaintiff were interested in the question of the lawfulness thereof.' "

The court said:

> "The necessity under the statute of having such questions settled by a single tribunal in order to secure singleness of practice and uniformity of rate has been pointed out and settled in Abilene, Pitcairn and Robinson cases, and is referred to here because this record and that in Pennsylvania R. Co. v. International Coal Min. Co., just decided (230 U. S. 184, 57 L. Ed. 1472, 33 Sup. Ct. 893) furnish a striking illustration of the results which would follow if the reasonableness of an allowance could be decided by different tribunals. Both cases involve the payment of 18 cents a ton to the Altoona Company dur-

ing the same period and for identically the same reasons. In both the plaintiff insisted that the payment was a rebate, and the carrier that it was compensation for services rendered. In the International case the judge treated the Altoona allowance as lawful and reasonable. In this case the referee found that it was a rebate, while the trial judge, in passing on exceptions to the report, held that it was a question of fact about which the evidence was conflicting, and thereupon approved the referee's report. Treating it as a question of fact, there may have been sufficient testimony to sustain the finding in both instances, although the conclusion was diametrically opposite. And, applying the rule that appellate courts will not disturb findings of fact where the evidence is conflicting, contradictory judgments might have been affirmed, and one plaintiff could have been awarded damages on the theory that the Altoona allowance was unlawful, and the other been mulcted in cost because the Altoona allowance was legal. This and like considerations compelled the holding that, as the courts have no primary jurisdiction to fix rates, neither can they do so at the suit of a single plaintiff who claims to have been damaged because an allowance paid its competitors was unreasonable in amount.

"It is argued that this conclusion ignores §§ 9 and 22, which give the shipper the option of suing in the courts or applying to the Commission. The same argument was made and answered in the Abilene case by showing that to permit suits based on the charge that a particular practice was unreasonable, without previous action by the Commission, would repeal the many provisions of the statute requiring uniformity and equality. For, manifestly, such uniformity and equality cannot be secured by separate suits before separate tribunals, involving the reasonableness of a rate or practice. The evidence might vary, and, of course, the verdicts would vary; with the result that one shipper would succeed before one jury and another fail before a different jury, where the reasonableness of the same practice was involved. Manifestly, different verdicts would occasion inequality between the two shippers, and it is equally

manifest that if the Commission had made one order of which both could avail themselves, there would have been one finding, of which one, two, or a score of shippers could equally avail themselves. The claim that this conclusion nullifies § 9 is concretely answered by the fact that the court has just decided to the contrary in Pennsylvania R. Co. v. International Coal Min. Co. There the carrier insisted that a suit for damages occasioned by rebating could not be maintained without preliminary action by the Commission. This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the Commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices, there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission, and not the courts, should pass upon that administrative question. When such order is made, it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice."

In LOOMIS v. LEHIGH VALLEY R. R. Co., 240 U. S. 43, the court said:

"Plaintiffs in error have long been shippers of grain and produce over the line of defendant carrier from Victor and other stations in Western New York. From time to time during a period beginning in August, 1906, and ending May 6, 1908, they requested it to furnish at such places for their use one or more cars—about two hundred altogether—suitable for transporting in bulk, wheat, oats, rye, apples, cabbages, and potatoes. In response, it sent ordinary box and refrigerator cars inadequate for the required service until fitted with inside doors or transverse bulkheads. Prior to 1906, in like circumstances, the custom was for the railroad to supply

lumber without charge and shippers constructed these temporary fittings. This practice was discontinued at the stations mentioned, and, during the period specified, it refused either to supply such material or cars completely prepared for carrying in bulk the enumerated articles. Plaintiffs were therefore compelled to construct inside doors or bulkheads in the cars which they loaded and delivered to defendant for transportation to points both within and beyond the State. The total cost of material used was $322.07,—it varied from 40 cents to $3.50 per car.

"Payment of the amount so expended was demanded by plaintiffs and refused. Without preliminary resort to the Interstate Commerce Commission, they then brought this action in a State court upon the theory that the carrier having failed to perform its common-law duty to furnish adequate cars, they were entitled to recover as damages their consequent outlay. * * *

"Speaking through Mr. Justice Lamar in Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. *supra*, we said (p. 255):

> 'The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute.'

"In the Minnesota Rate Cases, 230 U. S., *supra*, we further said (p. 419):

> 'The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it could be destructive of the system of regulation defined by the

> statute if the court, without the preliminary action of the Commission, were to undertake to pass upon the administrative question which the statute has primarily confided to it.'

"And in Texas & P. R. Co. v. American Tie & Timber Co. 234 U. S. *supra*, the rule *was thus stated* Ap. 146):

> 'It is equally clear that the controversy as to whether the lumber tariff included cross-ties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that, for the preservation of the uniformity which it was the purpose of the act to regulate commerce to secure, the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission.'

"An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 220, 58 L. Ed. 199, 576, 34 Sup. Ct. Rep. 291. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See Pennsylvania R. Co. v. Puritan Coal Min. Co., 237 U. S. pp. 128, 129, 59 L. Ed. 871, 872, 35 Sup. Ct. Rep. 484; Pennsylvania R. Co. v. Clark Bros. Coal Min. Co., 238 U. S. pp. 469, 470, 59 L. Ed. 1412, 35 Sup. Ct. Rep. 896.

"If, in respect to interstate business, the courts of

> New York may determine, as original matters, rate-making problems, those in other States have like jurisdiction. The uncertainty and confusion which would necessarily result is manifest. Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted."

Respondents, although they do not expressly refer in their petition to Section 3 of the Interstate Commerce Act, plainly raise the issue of discrimination. They charge that the Trustee is handling similar traffic, and furnishing equipment therefor, between Laredo, Texas, and Nuevo Laredo, Mexico, while declining to do so between Brownsville, Texas, and Matamoros (R. 10, 12); that the Trustee is likewise furnishing equipment for transportation from the ports of Corpus Christi and Houston through various gateways, including Laredo and Brownsville (R. 10); that the Trustee has acted with a deliberate design for the purpose of diverting tonnage from the Port of Brownsville to other gateways (R. 17); that the petitioners are denying to respondents equal opportunity of moving their traffic, as compared with other ports and gateways (R. 19); and that the acts of petitioners are preventing respondents "from having interstate traffic moved by common carrier * * * at the same rates and charges and under the same terms and conditions under which respondents (petitioners here) are transporting the identical traffic for other shippers and other gateways" (R. 19).

There could hardly be a plainer charge of unjust discrimination. And it is entirely clear from the decisions of this Court that such a charge must go to the Commission rather than the courts. The tariffs which are copied in the record do not disclose the existence of any through routes and joint rates. Rather, they show nothing but separately established

switching charges. And the charges set forth in the tariffs of petitioners apply only between points in the United States (R. 70a, 87, 90).

Even where carriers join in establishing through routes and joint rates, intermediate carriers have never been required by the Commission to furnish more than a ratable or proportionate number of cars. HUERFANO COAL CO. v. COLORADO & SOUTHEASTERN R. R. CO., ET AL., 28 I. C. C. 502; LUMBER RATES THROUGH OHIO RIVER CROSSINGS, 29 I. C. C. 38; CAMPBELL'S CREEK COAL CO. v. ANN ARBOR R. CO., ET AL., 33 I. C. C. 558. But see, IN RE HANDLING OF FRESH MEAT, 132 I. C. C. 49, in which the Commission said:

> "A shipper served by a switching line ordinarily makes initial request of that line for cars, but the carrier receiving the road haul is commonly looked to eventually to furnish cars, and respondent's freight-traffic manager so testified."

What would be a ratable or reasonable number of cars under all the surrounding transportation circumstances would clearly be a question for the Commission rather than the courts. So, even if there were through routes and joint rates, the question would be be administrative rather than judicial. Much more so is this true, when, as here, there is no through route, but only a combination of *separately established switching charges.*

In the light of the nature of the controversy, the facts disclosed by the record, and the decisions of this Court, we submit that the trial court correctly dismissed the petition, for the reason that it should have been presented to the Commission rather than the courts. The power which respondents would have exerted is essentially administrative, and the question of discrimination which they raise is not one which the courts should determine.

3. *Mandamus is not a proper or appropriate remedy.*

The respondents do not seek to have petitioners compelled to furnish equipment for the transportation of specific traffic, now tendered for immediate movement under present and known conditions. They allege that there is available, for movement through the Port of Brownsville "a *minimum annual tonnage* * * * to and from Mexico," including 50,000 bales of cotton, 10,000 tons of cottonseed cake, 100,000 tons of lead bullion, 24,000 tons of zinc concentrate, and other commodities in other substantial quantities (R. 11); but the petition (R. 11-15) makes it evident that the traffic alleged to have been once definitely arranged for has already moved by some other route, and the prayer is that petitioners be required to show cause, "if any there be, why a peremptory writ of mandamus should not issue requiring said respondents" (petitioners here) "*to continue to furnish, for all times in the future*, adequate and sufficient equipment and necessary facilities for the transportation of the commodities herein described to and from and between Matamoros * * * and the Port of Brownsville" (R. 19).

Reference in the petition to "the impossibility of definitely fixing the damages" (R. 12); the availability of *minimum annual* tonnage (R. 11); the possibility that respondents "will lose future traffic" (R.12); "the handling of all future traffic" (R. 17); future losses estimated at $125,000 annually (R. 17); the traffic "which might reasonably be expected to move in the future" (R. 17), and irreparable injury (R. 18), all serve to emphasize the fact that respondents seek a writ that will bind the petitioners into the indefinite future, without regard to car shortages, the requirements of other shippers, or other future conditions.

The affidavit of T. H. Levy, the Trustee's General Superintendent of Transportation, in charge of car supply, shows that there are "different types of equipment which are essentially fitted for the movement of certain kinds of traffic," such as flat cars, gondola cars, both ordinary and hopper-

bottomed, box cars, refrigerator cars and stock cars, double and single-decked (R. 71); that the Trustee's lines "produce a large volume of commodities which are seasonal in nature, * * * oranges, grapefruit, cabbage, spinach, beets, carrots, beans, lettuce, Irish potatoes, tomatoes and a number of other crops;" that to move these, refrigerator cars must be assembled in advance in large numbers, the movement to point of origin being generally an empty haul, and the surplus being moved empty to other sections of the country after the season ends (R. 72); that "elaborate surveys and inspections" must be made in advance by competent men, to determine when shipping will begin and the number of cars probably to be required; that due to weather conditions, market prices, and other unforeseeable factors these estimates "must constantly be corrected" (R. 73).

He further shows the car supply officer "has constantly pressing upon him for solution * * * the problem of holding down, as low as possible, the mileage charges paid to private car lines and the per diem charges paid to other railroads for the use of their equipment; that the Louisiana sugar cane crop, and the cotton and grain crops are heavy and seasonal, the cane crop furnishing several special difficulties; that other commodities move with substantial regularity throughout the year; while still others, like oil field equipment, move spasmodically, as necessity arises (R. 74).

The fact that many of these commodities must move over two or more lines of railroad, adds another complication, according to Mr. Levy, making coöperation necessary (R. 75). But on the other hand, the competition between railroads serving the same territory makes it essential that each line be able to supply the requirements of shippers to prevent all the business from going to the competing line (R. 76).

Mr. Levy also said:

> "In view of many of the factors and circumstances which I have mentioned above, it is quite obvious that

the car supply officer is frequently required to change or modify his plans on very short notice; to receive his information and give his instructions by telegraph or telephone and to shape his plan of campaign not only from month to month, but from day to day and from hour to hour and from minute to minute.

"Any court or commission or board or other governmental agency which undertakes to have any part in the regulation or control of the supply of cars on the defendant railroads, or either of them, or on any other American railroad, must, if the job is to be intelligently done, take into consideration the same facts and circumstances that the individual car supply officer would take into consideration in handling such matters for his own railroad, and must also take into consideration the needs of connecting and competing lines and their patrons, and must also be in position to act promptly in meeting unforeseen conditions and difficulties, and the entire plan must be kept in more or less fluid or plastic form in order that it may be modified on an instant's notice to meet some circumstance which has suddenly arisen or of which the car supply officer has suddenly been notified. For this reason, if any part of the plan is solidified, or any particular service or a particular quantity of equipment is definitely assigned to a particular service or a particular locality, conditions may arise which will cause some hardship and possibly great loss to shippers or carriers, or both, unless that assignment can be promptly changed or released" (R. 76).

Under such conditions, we submit that the writ of mandamus is not an appropriate remedy for the ills complained of, and the authorities so hold.

No court of law, with a writ of mandamus outstanding, bound down as it is by the requirements of notice and hearing, can constantly shape and mould a campaign of car supply, where the plan must be changed to fit the exigencies of the occasion, not only from month to month, but "from minute to minute," as well.

DIAMOND MATCH CO. v. POWERS, 51 Mich. 145, 16 N. W. 314, was a case in which the Match Company sought to occupy the office of a register of deeds, to make up an abstract of title of all the lands in the county. It was there said:

> "When the case presents a single occasion, and calls for an act which is presently determined, it is entirely practicable to direct the act by *mandamus*. But where the case contemplates something continuous, yet variable in its conditions and aptitudes, the remedy by that process seems an unfit one. It is the office of *mandamus* to direct the will, and obedience is to be enforced by process for contempt. It is, therefore, necessary to point out the very thing to be done; and a command to act according to circumstances would be futile."

The court pointed out that "the register has rights and duties which must be respected; so the general public have rights as well as the claimant; and the conditions are not steadily the same. They are subject to variation. On every occasion each must act reasonably, and with proper regard for the rights and duties of the others. As the circumstances vary the conduct must vary." So in this case, "the conditions are not steadily the same." So also, "the general public have rights as well as" the respondents. But if a writ of mandamus should issue, the conduct of petitioners could not vary with the circumstances. It must always lag behind; for the terms of the writ could be changed only after notice and hearing, and could not be modified by telegraph or telephone, from minute to minute.

The Court of Appeals of New York reached a similar conclusion in PEOPLE v. INTERURBAN ST. RY. CO., 177 N. Y 296, 69 N. E. 596, where it said:

> "It does not require much argument to show that the writ of mandamus is not, in this case, an appropriate

> remedy to compel a general course of official conduct or a long series of continuous acts, as it is impossible for the court to oversee the performance of such duties."

In that case the effort was to compel a street car company to issue transfers, good on connecting lines. Compliance with the writ would have been much more simple than it would be here. The necessities of other patrons could not have come in conflict with the demands of that plaintiff, as here they probably must. Nor could there have existed there a problem comparable to that so evident here, respecting the type, size and number of cars to be furnished for the movement of future traffic. *A fortiori,* if mandamus did not fit in that case, it would be inappropriate here.

In EX PARTE BALDWIN, 291 U. S. 610, 619, a writ of mandamus was refused because another remedy, by injunction, was available. Here, if the right exist, there is a clear administrative remedy by resort to the Interstate Commerce Commission, which has power, under Section 1 of the Interstate Commerce Act (49 U. S. C. A. 1) to prescribe rules and regulations for the furnishing of equipment; and, in proper cases, to require carriers to supply themselves with equipment.

In PEOPLE v. BROOKLYN HEIGHTS R. Co., 172 N. Y. 90, 64 N. E. 788, the Court of Appeals refused a mandamus to compel the carrier to operate its trains over certain routes, according to previous schedules, saying the duty was by no means clear. Neither is it here; for the respondents have no greater rights than shippers generally, and, especially in times of car shortage, all must share alike in the available supply. Neither is the duty clear to furnish particular types of equipment for certain kinds of traffic, and immediately on demand.

No case has been found, so far as we know, in which a court has issued a writ of mandamus to compel carriers to furnish equipment for all future shipments, as demanded, without regard to circumstances.

The writ was refused in STATE v. LELAND & R. Co., 128 Miss. 312, 91 Sou. 7, where the effort was to compel a carrier without cash or credit to rebuild and operate an unprofitable line. The similarity of its situation to that of the Port Isabel is elsewhere mentioned.

In STATE v. ATLANTIC COAST LINE R. Co., 53 Fla. 689, 44 Sou. 223, mandamus was sought to compel the respondent to put and maintain a line of railroad in a safe and suitable condition for service, and in doing so to use materials and appliances of stated character, number and dimensions. The court refused to dictate such details. But a writ requiring the furnishing of equipment in this case would be nugatory unless replete with details. If properly framed it would not contain a command "to act according to circumstances." Is cottonseed cake to be exposed to the weather, or lead bullion to pilferage, in flat or gondola cars? Should scrap iron be loaded in box cars? Is no attention to be paid in the writ to the suitability of the equipment for the particular traffic to be moved? The answer seems obvious. The rigid writ of mandamus simply does not fit the case.

Especially is this true with respect to the Port Isabel, which has no equipment. To be effective, the writ must require that line to procure some. Shall it buy or lease? What types of cars must it procure? How many of each? What plans and specifications shall be drawn for each type? Where and how shall it get the necessary money or credit? It is not shown to have the cash. If not, the Commission must be consulted, under Section 20a of the Interstate Commerce Act (49 U. S. C. A. 20a) before securities may lawfully be issued. So far as mandamus is concerned, these inquiries, of course, lead into a blind alley, and again make it plain that if a remedy exist it lies with the Commission rather than the courts.

But they lead to another well-settled rule. Mandamus will not lie when the writ would be futile. MISSOURI v. MURPHY, 170 U. S. 78, 95; UNITED STATES v. LAPP, 244 Fed. 377, 380;

STATE v. COLONY TRUST CO., 215 Fed. 307; STATE v. LELAND, ETC., R. CO., *supra;* LITTLE v. DODGE CITY, ETC., CO., 53 Kan. 329, 36 Pac. 755. In the case of the Port Isabel, the writ must, under present circumstances, be vain. It now has pending applications for a loan to purchase equipment, to which the respondents are objecting (R. 100).

Suits for mandamus are ordinarily beyond the jurisdiction of the courts of the United States. COVINGTON & C. BRIDGE COMPANY v. HAGER, 203 U. S. 109; MACON, D. & S. R. CO. v. GENERAL REDUCTION CO., 44 Fed. (2d) 499, 501. But it is claimed that Sec. 10 of the Act of March 2, 1889, as amended (49 U. S. C. A. § 49), confers such jurisdiction in cases like the present. That section reads, in part, as follows:

> "The district courts of the United States shall have jurisdiction upon the relation of any person * * * alleging such violation by a common carrier of any of the provisions of Chapter 1 of this title, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier * * * ."

It will be noted that discrimination is the basis for the jurisdiction so conferred, and that no discrimination was charged against the Port Isabel, for the reason that it does not serve the other ports which were claimed to be preferred. Sec. 49, therefore, confers no jurisdiction of the suit against the Port Isabel.

As was said in MACON, D. & S. R. CO. v. GENERAL REDUCTION CO., *supra,* that section "has, in view of the general objects of the Interstate Commerce Act, been narrowed in construction so as to exclude contentions of such a nature as that they ought to be passed on by the Interstate Commerce Commission, and to include only such as involve enforcement of

previous orders and determinations of the Commission, or matters so plain as to require no action by the Commission. The questions which ought to go to the Commission are, in general, the same, whether court action is invoked under this section or under some other."

In BALTIMORE & OHIO R. Co. v. U. S., 215 U. S. 481, CHIEF JUSTICE WHITE, then Associate Justice, referring to Section 49, then known as Sec. 10 of the Act to Regulate Commerce, said:

> "As it was settled in the Abilene Case that the right to question in the courts the rates established in accordance with the act to regulate commerce without previous resort, by complaint, to the Commission, in order to determine their unreasonableness, would be destructive of the act, and therefore was not permissible, that ruling is equally applicable to the provision as to furnishing cars contained in § 10, which is here relied upon * * *. To give to §10 the broad meaning which the court below fixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted, since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889. This conclusion being in reason impossible, it must follow that, construing the provisions of § 10 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the Commission * * *."

We have cited above the cases in which it was held that in

matters of the kind presently involved, administrative action by the Commission is a prerequisite to any resort to the courts.

Several cases may be found in which, under Sec. 49, the writ of mandamus has been issued to compel a carrier to supply cars. An example is WEST VIRGINIA NORTHERN R. Co., ET AL., v. U. S., 134 Fed. 198. We suppose the Court will take judicial notice of the fact that coal is usually, perhaps universally, loaded in gondola cars. It seems to us that even aside from the matters which have just been mentioned, there is a very substantial distinction between a writ commanding a carrier to furnish a shipper with a specified number of coal cars per day, of a certain percentage of the carrier's supply of such cars, and a writ, such as would be here required, commanding the carrier to furnish the particular type and size of cars appropriate for the movement of various classes of traffic ranging from cotton and cottonseed to cement, coke and scrap iron (R. 11).

Under Section 28 of Chapter 192 of the Acts of the Forty-First Legislature of Texas (p. 410, 419), the respondent District has "the right, power and authority to acquire, purchase, take over, construct, maintain, operate, develop and regulate wharves, docks, warehouse, grain elevators, bunkering facilities, belt railroads, floating plants, lighterage, towing facilities, lands and all other facilities or aids incident to or necessary to the operation or development of ports or waterways within the district, and extending to the Gulf of Mexico." It thus appears that respondents have full authority to purchase and put to use such cars, locomotives and other equipment as may be necessary or desirable for the operation or development of their port. By Section 30 of the same Act; "said District may issue bonds in payment for the improvement so found to be necessary." The District thus has power to furnish its own remedy by buying its own equipment. It has not called on petitioners to build its wharves or docks, or

the tracks which immediately serve them. No more should it call upon them to furnish the cars which may be desirable for moving this Mexican traffic.

As shown by the record (R. 75), the Mexican National Lines some years ago, for reasons evidently sufficient to themselves, discontinued the practice of permitting their equipment to cross into the United States. In shipments moving between the Port of Brownsville and points in Mexico, the National Railways of Mexico are the only carriers which enjoy a substantial line haul; and, naturally, they receive the lion's share of the revenue paid for transportation of the freight. Therefore, it would appear to be reasonable for the Mexican Lines to furnish all necessary cars for switching to and from the docks at the Port of Brownsville and for transportation over their lines from points of origin and to destinations in Mexico. There is something inherently wrong with a demand that American railroads, which would enjoy no substantial revenue from the transaction, be required to furnish all the equipment for the movement of all such future traffic, while the Mexican railroads, the real beneficiaries of the business, furnish none.

Looking again at the whole case, it seems quite apparent that mandamus is not an appropriate remedy, and the District Court, therefore, properly dismissed the petition.

Conclusion

What has been said above may be summarized as follows:

The Interstate Commerce Act, by virtue of its application to foreign commerce only in so far as the transportation takes place within the United States, does not create or impose upon petitioners a duty to furnish equipment for the through movement of the foreign traffic here involved. Through routes and joint rates do not exist. If there be discrimination, the record does not show that the Commission has found it. It is true that the majority in the Circuit Court

of Appeals declared that there is no "necessity for an order requiring the Missouri Pacific to send its equipment to foreign soil" (R. 147). But the very essence of the complaint rests on a refusal to furnish cars for movements between a point in Texas and points in Mexico. Therefore, the legal duty which must exist as a predicate for the writ of mandamus does not exist in fact. The essential nature of the function to be exercised is administrative—not judicial. The question of discrimination which arises on the face of the petition for mandamus is one which the Commission alone may determine. The District Court had no jurisdiction to entertain the suit for mandamus, even under Section 49 of Title 49 U. S. Code. Finally, under the decisions, mandamus will not issue to compel a general course of official conduct, or a long series of continuous acts.

With all respect, we ask that the judgment of the Circuit Court of Appeals be reversed, and that of the District Court affirmed.

JOHN P. BULLINGTON,
Attorney for Port Isabel & Rio Grande Valley Railway Company;

ROBERT H. KELLEY,
Attorney for Guy A. Thompson, Trustee

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In the

Supreme Court of the United States

October Term, 1937

No. 300

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, GUY A. THOMPSON, *Trustee*, and PORT ISABEL AND RIO GRANDE VALLEY RAILWAY COMPANY, *Petitioners*

vs.

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL., *Respondents*

REPLY OF RESPONDENTS TO THE PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

A. L. REED,
Attorney for Respondents.

Dated: Dallas, Texas,
September 14, 1937.

Address:
CALLAWAY & REED,
Dallas, Texas.

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vs.

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL., *Respondents*[2]

REPLY OF RESPONDENTS TO THE PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

The joint and several reply of respondents to the petition for certiorari herein respectfully shows:

1. The petition does not correctly state the issues raised by the original petition for mandamus. The pur-

[1]Petitioner Guy A. Thompson, trustee of the St. Louis, Brownsville and Mexico Railway Company and the Railway Company will be referred to herein as the Missouri Pacific line; petitioner Port Isabel & Rio Grande Valley Railway Company will be referred to as the "Port Isabel line." Collectively they will be called "petitioners."

[2]The Brownsville Navigation District of Cameron County, Texas, will be referred to as the "Port of Brownsville." Respondents Lallier & Philen as "the shippers." Collectively, they will be called "respondents."

ported statement of the allegations, paragraph 2 of the petition (pages 2 and 3), in the form of eviscerated quotations, is utterly inadequate. The summary of the original petition in the majority opinion of the lower court by Circuit Judge Holmes has not been effectively challenged in the petition for certiorari. We shall, therefore, abstain from reviewing the pleadings, and respectfully refer this Court to that opinion for a correct statement of the allegations. (R. 187-193.)

2. The statement on page 4 of the petition (paragraph 5), with reference to the handling of the traffic between Port Brownsville and the interchange with the National Railways of Mexico, is not complete and does not fully describe the situation before the Court. The statement in question follows:

> "In consequence, any shipment moving between the Port of Brownsville and Matamoros, or any other point in Mexico reached through Matamoros, must move 7.4 miles over rails operated by the Port Isabel, 2.49 miles over the trustees rails, and 1.24 miles over the Bridge Company's rails; thence over the rails of the Mexican National lines."

The facts are, as alleged in the bill of complaint:

> "Respondent Missouri Pacific owns and controls, or jointly with other parties unknown to these petitioners, owns and controls an international bridge for the handling of traffic between Brownsville, Cameron County, Texas, and Matamoros, in the State of Tamaulipas, Mexico. Said City of Brownsville in Cameron County, Texas, and Matamoros in the State of Tamaulipas, Mexico, are situated adjoining each other except that they are separated by the international boundary line located in the

center of the Rio Grande river. In the center of said international bridge, respondent Missouri Pacific lines, connects with the rail lines of Mexico serving the community of Matamoros." (R. 9.)

The proof on hearing will show that the Missouri Pacific Railway performs the transportation service and effects delivery and makes interchange with the National Railways of Mexico through the joint use of this bridge. The tariffs on file with the Interstate Commerce Commission specifically cover the charges for this service. The tariff of the Missouri Pacific Railway applies "on all carload freight except as otherwise shown to or from points in Mexico." (R. 132.) The tariff of the bridge company is on file with the Interstate Commerce Commission and covers the charges for the use of the bridge in effecting said interchange. (R. 135-136.) The service demanded by respondents is the transportation between the Port of Brownsville and the interchange point where the Missouri Pacific contacts the National Railways of Mexico. As stated above, the tariff on file with the Interstate Commerce Commission specifically covers that service. While it is true that rails of the National Railways of Mexico must, as a practical matter, be used by the Missouri Pacific in effecting interchange with the National Railways of Mexico, it is nevertheless the fact, as shown by the record, that the Bridge Company has rates on file with the Commission covering that service and that it is a joint undertaking of the Missouri Pacific Railway as alleged in the bill of complaint. (R. 9.)

The statement on page 5 (paragraph 5), that the transportation of the commodities in question involves the separately established charges of the Mexican National lines, is in error for the reason that the published tariffs filed with the Interstate Commerce Commission by the Port Isabel Railway (R. 125), the Missouri Pacific lines (R. 132), and the Brownsville and Matamoros Bridge Company (R. 135-136) cover all the service that is being demanded by respondents, that being the identical service that the Missouri Pacific is actually performing for traffic moving through the gateway of Brownsville for all destinations other than the Port of Brownsville.

3. The statement in paragraph 6 of the petition (page 5) that

> "* * * respondents seek a writ of mandamus commanding petitioners to move traffic between Matamoros and the Port of Brownsville and to furnish equipment and facilities therefor."

Does not give a full understanding of the matter involved. As stated above, respondents seek only the transportation provided for in the filed tariffs of the Port Isabel line, the Missouri Pacific Railway, and the Matamoros and Brownsville Bridge Company.

The statement on page 5 that there is no allegation that the trustee has refused to transport respondents' traffic is in error. The following allegation appears in the original petition:

> "Petitioners have made reasonable and seasonable demand upon respondents to transport the commodi-

> ties here involved. Respondents have published rates which they have voluntarily offered to the public as reasonable rates for its transportation and *have refused to permit traffic moving through the Port of Brownsville to be transported at those rates and have refused to furnish facilities and equipment for its transportation.*" (R. 12.) (Italics not in original.)

The commodities involved are described at record pages 15 and 16.

It is alleged that certain traffic was tendered and that its transportation was refused. The car numbers with respect to the traffic are given in the record and the specific refusal of the Missouri Pacific to receive and transport the commodities is there shown. (R. 18, 19, 20.)

The statement on page 5 that

> "No traffic has been tendered to the trustee for transportation by the respondents either at the Port of Brownsville or at Matamoros because the trustee only operates an intermediate line, and has no railroad which directly serves Matamoros or the Port of Brownsville."

is inaccurate and erroneous. The facts are, as alleged (R. 9), that in connection with traffic coming out of old Mexico, the Missouri Pacific operates jointly with the National Railways of Mexico the international bridge where the traffic is interchanged between the two lines. At that point traffic has been tendered to the Missouri Pacific as joint operator of the bridge company. (R. 12.) The allegations in the original petition for mandamus show that traffic was loaded at the Port of Brownsville and ready to be tendered to the Missouri Pacific but

that, upon specific advice from the Missouri Pacific that it would not receive such traffic and transport it, the traffic was not accepted by petitioner Port Isabel and Rio Grande Valley Railway. (R. 18, 19, 20.) It is therefore incorrect to state that traffic has not been tendered to petitioner Missouri Pacific lines.

4. The statement in paragraph 7 of the petition (page 6) that this case is not concerned with the construction of a tariff is incorrect. The case involves nothing other than the duty of petitioners to perform transportation, as defined in the Interstate Commerce Act, under rates published and on file with the Interstate Commerce Commission.

5. The opinion of the Circuit Court of Appeals is not as stated, paragraph 8 of the petition (page 6), in conflict with applicable decisions of this Court, because the matter involved does not require the exercise of the administrative jurisdiction of the Interstate Commerce Commission.

All other statements in the petition, pages 1 to 6 inclusive, not referred to above are admitted to be correct.

WHEREFORE, respondents, jointly and severally, pray that in the exercise of its discretion, this court deny the petition for the writ of certiorari to review the decision of the Circuit Court of Appeals herein.

Respectfully submitted,

A. L. REED,
Attorney for Respondents,
Brownsville Navigation District
of Cameron County, Texas.
F. A. Lallier, J. G. Philen, Jr.

REPLY TO PETITIONERS ARGUMENT AND BRIEF IN SUPPORT OF RESPONDENTS' REQUEST THAT A WRIT OF CERTIORARI BE DENIED

(a) *As to the Grounds of Jurisdiction*

The authority for the jurisdiction of this court is correctly stated by petitioners on page 7 but we do not concur in their statement that the case of *DiGiovanni v. Camden Fire Insurance Company*, 295 U. S. 728, represents a set of circumstances similar to those involved in the instant proceeding.

That case involved a question whether jurisdiction could be conferred on the Federal District Court by combining the separately assumed amounts of two insurance policies, one covering property of the husband and the other the property of the wife. No such question is here presented.

(b) The Statement of the Case is Both Incomplete and Incorrect

Petitioners' statement of the case (pages 8-9) is an incomplete, inaccurate, and argumentative discussion which is totally inadequate to give an understanding of the issues involved. We refer again to the majority opinion of the lower court (R. 187-193) for a correct statement of the issues presented.

Certain statements of petitioners, however, require particular attention:

1. On page 8 of the petition the statement is made that the Port Isabel Railway

> "* * * now has pending before the Interstate Commerce Commission and the Reconstruction Finance Corporation application for a loan to enable it to buy some freight equipment, but the respondents have objected and are objecting to all of the proposed loan."

The matter seems irrelevant to the issues in this case. However that may be, the record shows that the application on file with the Interstate Commerce Commission and the Reconstruction Finance Corporation does not relate in an way to the purchase of equipment. The loan was requested for the purpose of constructing a wholly unnecessary new line of railway designed to divert traffic from the Port of Brownsville and for the purpose of paying certain indebtedness of the Port Isabel line. (R. 148-149.) It is not a fact that the Port of Brownsville has opposed a loan for the purpose of purchasing equipment. (R. 148-149.)

2. On page 8 of the petition it is stated:

> "In the opposite direction on traffic to the Port of Brownsville originating at Matamoros, the initial carrier must be the Mexican lines, which refuses to permit its equipment to come into this country."

The statement obscures the issues. All that respondents are seeking in this proceeding is to have petitioners comply with their tariff provisions reproduced in the

record (132), specifically applying on traffic "to or from points in Mexico." Necessarily this provision comprehends the interchange of traffic with the National Railways of Mexico. Respondents seek only the enforcement of the provisions of this tariff. Respondents do not seek to have any provisions of the Mexican tariffs enforced or any equipment of the Mexican railways moved into this country. The record definitely shows, as stated by the lower court, that the equipment of the American Railways is freely interchanged with the National Railways of Mexico for the purpose of handling traffic to and from the Republic of Mexico. (R. 11, 14, 147-148, 170-171.) These interchange arrangements are the subject of a joint publication on file with the Interstate Commerce Commission covering the car hire and interchange of cars. (R. 148, 170-171.) The petitioners, Missouri Pacific and Port Isabel line, perform joint through line transportation between the Port of Brownsville and the interchange with the National Railways of Mexico. In connection with this traffic, the Missouri Pacific is necessarily, insofar as the tariff provisions in this case are concerned, the orginating and delivering carrier. It is incorrect to say that the Mexican line is the initial carrier. It is incorrect to state that the Missouri Pacific has no interest or concern in the movement except the performance of a switching service. It is a part of the through route. There are through rates. They are the separately published factors, but they are necessarily through rates to cover joint through transportation service.

3. On page 9 of the petition the statement is made that:

> "The problem, therefore, is essentially administrative. No rule or other provision of any tariff was offered in evidence for construction by the court as to meaning or application."

The statement is in error. The tariff provisions require no interpretation. They are clear and unambiguous. They provide for the transportation between points in the United States of commodities moving to and from Mexico. The petitioner Missouri Pacific has, by its tariff publications, held itself out to perform that transportation service on traffic to and from Mexico to the interchange with the Port Isabel line in Brownsville. (R. 132.) Respondents seek only the performance of that transportation duty.

4. The statement is made on page 9 of the petition that:

> "The majority opinion erroneously stated that Lallier and Philen tendered freight to the appellees who failed to transport it."

The statement is erroneous. We have previously quoted herein the allegations that petitioners had reasonably and seasonably demanded that respondents transport the commodities here involved. (R. 12.) The commodities involved are described at record page 15. It is alleged that respondents have refused to permit traffic moving through the Port of Brownsville to be transported at those rates and have refused to furnish facilities and equipment for its transportation. (R. 12.) Specific in-

stances of that refusal are shown in the bill of complaint, record pages 18, 19 and 20.

5. The petition states, at page 9, that the majority opinion in the lower court is in error in stating that "there is no request or necessity for an order requiring the Missouri Pacific to send its equipment to foreign soil." We insist that the lower court was correct. We seek only to have the delivery made to the interchange with the National Railways of Mexico. The Missouri Pacific Railway may make that interchange in the center of the international bridge if it so desires. Respondents seek an order from the court commanding the petitioners to perform the transportation in accordance with their published tariffs and nothing else.

6. The statement on page 9 of the petition that the record shows no tariff, rule, or statement that cars will be furnished for the transportation of the commodities involved is wholy beside the point. No tariff publication in connection with any rate makes the explicit statement that cars will be furnished. The Interstate Commerce Act provides in Section 1, paragraph 3, that the term "transportation, as used in this act, shall include locomotives, cars, and other vehicles, etc." The publication of a rate for the transportation, includes by the terms of the Act itself, the provision for the cars essential to the transportation service for which the rates were published. The tariffs under which the transportation service here sought to be performed are in the record, pages 125 to 136.

(c) *Answer to Petitioners' Argument*

Petitioners contend that there is no published rule requiring them to furnish cars in order that transportation service might be performed under the published tariffs. The existence of the published tariffs is not denied. They contend that, because the tariff does not state specifically that the railway companies will furnish cars, the matter involved is an administrative question which should be submitted to the Interstate Commerce Commission. Their contention may be stated as follows:

> "It is necessary, in addition to having a published tariff, to have a published rule stating that cars will be furnished for the purpose of transporting commodities at the published rate."

The matter here presented is not one within the jurisdiction of the Interstate Commerce Commission. *United States v. Pennsylvania Railroad Co.*, 242 U. S. 208; *C. S. Wells & Son v. Chicago, Burlington & Quincy Railroad*, 161, I. C. C. 145, 149; *In the Matter of Private Cars*, 50 I. C. C. 652, 671. The Interstate Commerce Commission, following the decision of this court in *United States v. Pennsylvania, supra*, has held that it is without jurisdiction to issue an order requiring the rail carriers to furnish equipment for the performance of their transportation duty as defined in Section 1, paragraph 4 of the Interstate Commerce Act.

The matter of discrimination growing out of the state of facts here involved as between the Port of Brownsville and other Gulf ports, has been presented to the Inter-

state Commerce Commission and is now pending before that Commision in *Docket 27691, Brownsville Navigation District of Cameron County, Texas, et al v. The St. Louis, Brownsville and Mexico Railway Company, et al.*

The contention of petitioners at once raises the question whether the carriers subject to the Interstate Commerce Act may, in each instance where a carload of freight is tendered to them, refuse to furnish cars for its transportation at the published rates. Petitioners, it seems would contend that, in each such instance, an application must be made to the Interstate Commerce Commission for an administrative order requiring the carriers to furnish a car so that the transportation service might be performed at published rates. After a shipper has obtained such an administrative order, he would still be required to go to court to enforce it before the transportation service can be obtained. The provisions of the Act clearly negative such a contention.

Section 1, paragraph 3, Title 49, Chapter 1, U. S. C. A., defines the term "transportation" as follows:

> "The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

This Court, in interpreting that paragraph of Section 1, has held that it is complete and all inclusive and that it supersedes all state regulations with respect to the furnishing of cars and equipment. See *Southern Railway Company v. D. L. Reid*, 222 U. S. 424, 32 S. Ct. 140; *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Edward Dettlebach*, 239 U. S. 588, 36 S. C. 177. The state courts in this territory have followed these decisions and made like findings. See *Atchison, Topeka & Santa Fe Ry. v. Smyth*, 189 S. W. 70; *Ft. Worth & Denver City Ry. Co. v. Strickland*, 208 S. W. 410; *Cecil v. Southern Express*, 229 S. W. 1041.

Section 1, paragraph 4, Chapter 1, Title 49, U. S. C. A., provides:

> "It shall be the duty of every common carrier subject to this part engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, etc."

The sole question in this case, as stated by the lower court, is whether or not there are published tariffs covering the service demanded by respondents. The published tariffs of the Missouri Pacific lines specifically state that it is applicable on traffic "to and from points in Mexico." The tariff applies between the interchange of the Missouri Pacific lines with the Brownsville & Matamoros Bridge Company and the interchange with connecting lines in Brownsvile. The Port Isabel Railway is "a connecting line in Brownsville." Therefore, on traffic to and from Mexico, the Missouri Pacific has a pub-

lished rate from its interchange with the Brownsville & Matamoros Bridge Company and the interchange with the petitioner Port Isabel line ranging from $3.15 to $4.05 per car. (R. 132.) The Port Isabel line has a published tariff on file with the Interstate Commerce Commission stating that:

> "A charge of $8.10 per car will be assessed from interchange connections with the St. Louis, Brownsville and Mexico at Brownsville, Texas, to and from points on the Brownsville Navigation District tracks on all classes and commodities originating at or destined to points in Mexico." (R. 126.)

The Brownsville & Matamoros Bridge Company has a tariff on file with the Interstate Commerce Commission naming the charges by classes 1 to 12. These are assessed for the use of the international bridge. As alleged in the bill of complaint, the international bridge is a joint operation of the Missouri Pacific and the National Railways of Mexico. (R. 9-11.)

While the pleadings and evidence do not deal with the question of how the bridge is operated, the evidence or hearing will show that it is a vehicular as well as a pedestrian bridge and is used also by the railroads for interchange of traffic. As a legal matter necessarily interchange is effected at the international boundary line. As a practical matter so that the bridge may not be blocked with railroad cars and its use as a vehicular bridge destroyed, the Missouri Pacific Railway performs the transportation service from Brownsville over the bridge into the yards of the National Railways of Mex-

ico in Matamoros, Tamaulipas, Mexico. Technically, however, respondents can only seek and demand of petitioner Missouri Pacific the performance of the transportation service to the interchange with the National Railways of Mexico. We seek nothing else. That interchange is provided for in published tariffs lawfully on file with the Commission. (R. 147-148.)

The real difficulty, as stated by the court below, grows out of the desire of petitioner Missouri Pacific to divert the traffic from the Port of Brownsville to other ports served by its rails so that it might thereby enjoy a longer haul on the traffic. In order to accomplish this end, the petitioner Missouri Pacific line has taken advantage of the fact that the petitioner, Port Isabel line, is one of the many short line railways of the nation that owns no equipment but obtains its supply from the trunk lines under rules and regulations prescribed by the Interstate Commerce Commission and approved by this court. See *Rules for Car Hire Settlement, 160 I. C. C. 369, 165 I. C. C. 495*, and *Chicago, Rock Island & Pacific Railway Co. v. United States*, 284 U. S. 80, 52 S. Ct. 87. In the last case this Court at page 95 stated:

> "The trunk lines, as owners, furnish in the main all the car equipment used by the short lines."

Mr. L. S. Bourne, General Manager of petitioner Port Isabel line since 1925 (R. 166) stated:

> "The Rio Grande has operated under those rules for the interchange of loaded cars and empty cars with the Missouri Pacific and the Southern Pacific since my tenure of office as general manager of the

> Rio Grande. The car service rules of the American Railway Association provide remuneration for the use of cars owned by one carrier and operated and used by another carrier. The remuneration is known in the railway industry as per diem. It is customarily a charge of $1.00 per day for the use of equipment while in the use of a railroad not owning the car. The Rio Grande has at all times, where it has made use of equipment furnished it by the Missouri Pacific and the Southern Pacific complied with these American Railway Association Car Service Rules, and it has paid the per diem to the Missouri Pacific and the Southern Pacific as required by the terms and conditions of those rules. We have never refused to abide by the rules or paid the charges therein prescribed." * * *
>
> "We are ready and willing to transport loaded cars from the turning basin to the interchange at Brownsville under the published switching tariff published by us as a result of the agreement with the Southern Pacific and Missouri Pacific hereinabove referred to."
>
> * * * "We have only discontinued so transporting the cars after said carriers refused to furnish the equipment or refused to receive from us cars loaded at the turning basin." (R. 168-169.)

In reviewing the rules prescribed by the Commission, which are now published and on file with the Commission, this Court in the case last cited, stated:

> "Short lines, as well as trunk lines, participating in joint rates, must furnish their share of equipment. If they do not own cars, they must rent them. The Commission itself has pointed out very clearly the basis for this requirement." 284 U. S. at 97.

The Commission itself, as stated by the Court, had prescribed the rules under which the short lines might

rent equipment from the trunk lines who own and control the supply. The rules under review by the Supreme Court in that case dealt particularly with this question. In that connection the Court made this further statement:

> "Moreover, the car equipment of the country is substantially in the hands of the trunk lines, that owned by the short lines being almost a negligible proportion of the whole. And this fact affords some additional grounds for the classification. Indeed the classification was recognized as legitimate by appellants themselves. When they subscribe to the provisions that short lines should be permitted to become associate members only of the American Railway Association but without voting rights." 284 U. S. at 93-94.

This Court was there discussing the car service rules of the American Railway Association specifically referred to by Witness Bourne. These rules are on file with the Commission in a tariff specifically listing the Port Isabel line as a participating carrier. (R. 148.)

The Port of Brownsville, as stated by the lower court, is a new port, opened to the public May 16, 1936. Shortly thereafter, when the commerce began to move through Brownsville to and from the Republic of Mexico, the Missouri Pacific, by reason of the fact that it was losing the business at other ports, refused to transport the commodities to and from the interchange with the National Railways of Mexico and the interchange with petitioner, Port Isabel Railway. (R. 17.)

On October 7th, Missouri Pacific car 83054 was loaded at the Port of Brownsville with sheet steel for transpor-

tation to Monterrey in the Republic of Mexico. This car had reached the lines of the Port Isabel Railway under load and after it was unloaded the shipper at the port of Brownsville had reloaded it for transportation under the published rates to the interchange with the National Railways of Mexico through the gateway of Brownsville. The petitioner, Port Isabel line, refused to receive the car because it had been informed by the Missouri Pacific that the latter would not receive it at Brownsville and transport it. (R. 18-19.) The allegations are that this traffic was tendered to the carriers with an expression from the shippers of their willingness and readiness to pay the lawful charges as published and on file with the Commission. (R. 22-23.)

Another instance is contained in the evidence of Witness Hofmokel. Certain steel billets were booked by the shippers for transportation to the Port of Brownsville, thence by railroad to Monterrey, Mexico. By reason of the refusal of the Missouri Pacific to permit the petitioner, Port Isabel line, to load equipment on its rails, by reason of the refusal of the Missouri Pacific to receive the loaded cars when tendered, and by reason of their refusal to transport from the interchange of the Port Isabel line to the interchange with the National Railways of Mexico, the steel billets were diverted to Corpus Christi. There, American railway cars were used for the loading of the traffic from the vessels onto the cars. These cars were transported by the Texas Mexican Railway from Corpus Christi to Laredo, there the cars were

delivered to the National Railways of Mexico and transported loaded into Monterrey, State of Nuevo Leon, Republic of Mexico. These same cars or similar cars would have been used at Brownsville for the same transportation, the only difference being that the Missouri Pacific at Brownsville would have transported the cars to the interchange with the National Railways of Mexico, whereas from Corpus Christi they were transported by the Texas Mexican Railway. When these loaded cars reached Monterrey, they were made empty and loaded northbound with return commerce moving through the American ports to European and American destinations. The Missouri Pacific had informed the shippers in Mexico that, if routed by the Port of Brownsville, they would not be transported at Brownsville at the published rate hereinabove referred to. (R. 144-145.) The commerce in question would have required no more cars, and in fact not as many, if transported through the Port of Brownsville than it did require for the transportation through the Port of Corpus Christi. The same use of the American cars under the same rules and regulations is sought at Brownsville as is being accorded to other ports.

It is therefore clear that three propositions were submitted to the District Court. First, the issuance of a mandamus compelling the carriers to transport the cars that were loaded on the lines of the Port Isabel & Rio Grande Valley Railway. Obviously, these cars reached the Port Isabel line under the existing car service rules. They were loaded in accordance with the practices under those

rules. They were tendered to the carriers with the request that they be transported at published rates. This transportation was refused. An administrative order with respect to this matter would be nothing other than an order stating that the carriers should move the traffic. It could only be enforced by the courts.

Second, traffic reached the Port of Brownsville requiring cars for its transportation. The Port Isabel line, owning no equipment, was denied an opportunity to rent that equipment under the car service rules published and on file with the Commission and approved by this Court.

Third, loaded and empty cars are sent into Mexico for the transportation of commodities into and through American ports. These cars reach the National Railways of Mexico under the interchange regulations on file with the Commission, but petitioner, Missouri Pacific, will not transport them to the Port of Brownsville loaded with commerce for transshipment through that port.

The jurisdiction of the lower court to issue the mandamus sought to enforce the carriers duty to transport at published rates arises under Section 49, Title 49, Chapter 2. U. S. C. A. That section provides as follows:

> "The district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm or corporation, alleging such violation by a common carrier, of any of the provisions of the preceding chapter, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or

upon terms of conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: Provided, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by the preceding chapter."

In interpreting that section of the Act this Court has recognized two classes of cases, one in which preliminary resort must be had to the Interstate Commerce Commission for the exercise of its administrative function; the other in which no such preliminary resort to the Commission is necessary. The first is a class of cases in which it is sought to change or alter existing rules, rates, and regulations on file with the Commission. The second is a class of cases in which no attack is made on existing rules or tariff provisions, but where the purpose is merely to seek the enforcement of the carriers duty to transport at published rates and to comply with the statutes and the lawfully published tariffs. Such a case, it is held, may be brought in the district court in the first instance.

No case has been cited by petitioners in which it has been held that it is necessary to resort to the preliminary administrative jurisdiction of the Interstate Commerce Commission in order to enforce the carriers duty to transport at published rates.

The first case cited by petitioners is that of the *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477. The facts are fully stated by the Court as follows:

> "This action was brought by the Merchants' Elevator Company in a state court in Minnesota against the Great Northern Railway Company and the Director General to recover $80 alleged to have been exacted in violation of the carrier's tariff. That sum had been demanded by the carrier, under Rule 10 of its tariff, as a reconsignment charge, at the rate of $5 a car, for 16 cars of corn shipped from points in Iowa and Nebraska to Willmar, Minn., and after inspection there rebilled to Anoka, a station beyond. The tariff rate from the points of origin via Willmar to Anoka was the same as to Willmar. Willmar had been named as destination in the original bill of lading, only because it is the place at which grain coming into the state by this route is inspected and graded under the laws of Minnesota and of the United States, and the carrier knew, or should have known that fact. Immediately after inspection, disposition orders were given, and the original bills of lading were surrendered in exchange for billing to Anoka. Rule 10 read:
>
> " 'Diversion of reconsignment to points outside switching limits before placement: If a car is diverted, reconsigned or reforwarded on orders placed with the local freight agent or other designated officer after arrival of car at original desti-

nation, but before placement for unloading, * * * a charge of $5.00 per car will be made if car is diverted, reconsigned or reforwarded to a point outside of switching limits of original destination.' "

"The shipper contended that the case was within the exception known as exception (a), as amended by supplement 1, which provided that rules (including Rule 10) shall not apply to '(a) Grain, seed (field), seed (grass), hay or straw, carloads, held in cars or track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto.'

"Whether the charge was payable depended solely upon a question of construction; that is, whether the body of the rule or the exception to it applied. On this question there was room for reasonable difference of opinion. The carrier, relying particularly upon Texas & Pacific Ry. Co. v. American Tie & Timber Co., 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255, and Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43, 36 S. Ct. 228, 60 L. Ed. 517, claimed reasonably that until the true construction of the tariff had been determined by the Interstate Commerce Commission, the trial court was without jurisdiction." 259 U. S. at 288.

Distinguishing the *American Tie & Timber Co.* case and the *Loomis* case, the Court said:

"In the case at bar the situation is entirely different from that presented in the American Tie & Timber Co. Case, or in the Loomis Case. Here no fact, evidential or ultimate, is in controversy, and there is no occasion for the exercise of administrative discretion. The task to be performed is to be determined by the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary." 259 U. S. at 294.

In a like manner, the only question presented in the case at bar is whether there is a duty resting upon petitioners to transport the commodities tendered by respondents. The question is determined by an examination of the provisions of the Act and of the published tariffs. No contention is made that the applicable tariff provisions contain language used in a technical sense, the construction of which requires the expertness of an administrative body. No contention is made that any words of the applicable tariff provisions are used in any sense other than their ordinary meaning. The case fits perfectly into the excellent statement of the rule in Vol. 2 of Sharfman, The Interstate Commerce Commission, at 401:

> "Thus, for example, the principle of primary jurisdiction has been held to be inapplicable in cases involving construction of tariffs, departure from published rates, unequal enforcement of car-distribution rules. In these circumstances the only task was to apply the law to uncontroverted facts. In construing the words of carrier tariffs used in their ordinary meaning, independently of external conditions, and in awarding damages for departures from published rates and for discriminatory enforcement of established car-distribution rules, practices definitely prohibited by statute, the courts were but asserting a jurisdiction expressly reserved to them. The reasons for requiring preliminary resort to the Commission, in conformity with the nature and purposes of the regulatory structure as a whole, were not operative under these conditions, because no issues of fact, evidentiary or ultimate, were involved, and there was neither need nor occasion for the exercise of administrative discretion."

The next case cited by petitioners is that of *Baltimore & Ohio Railroad Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 30 S. Ct. 164, 54 L. Ed. 292. (This case is cited by petitioners as *Baltimore & Ohio Railroad Co. v. U. S.*, 215 U. S. 480.) That case involved litigation to modify or change for the benefit of the Pitcairn Coal Company the existing established and published rules covering the distribution of coal cars in time of car shortage. It therefore involved paragraphs 12 and 15 of Section 1 of the Interstate Commerce Act and not paragraphs 3 and 4. In disposing of that case this Court stated:

> "To decide the merits of this case will require us to determine the legality of the regulations of the B. & O. Railroad Company by which that company distributed cars to coal mines along the line of its road in case of car shortage." 215 U. S. at 482.

It was admitted in the *Pitcairn* case that the coal mine received all the cars to which it was entitled under the established regulations of the B. & O. Railroad Company, and it is shown in the opinion (215 U. S. at 495) that the Commission had expressly approved the B. & O. regulations that were under attack. The *Pitcairn* case did not involve the enforcement of an existing regulation or rate but an effort to modify existing car service rules.

Morrisdale Coal Co. v. Pennsylvania Railroad Co., 230 U. S. 304, 33 S. Ct. 938, 57 L. Ed. 1394, involved the reasonableness of existing published car service rules, filed with the Interstate Commerce Commission in compliance with the provisions of paragraph 12, section 1, of the Interstate Commerce Act relating to the distribu-

tion of coal cars. The coal company sought to modify the rules and regulations so that privately owned equipment would be counted in the proration of available cars. Necessarily a proceeding of that character involved an administrative question that should be submitted to the Commission.

In *Pennsylvania Railroad Co. v. Clark Bros. Coal Mine Co.*, 239 U. S. 456, 35 S. Ct. 896, 59 L. Ed. 1406, Clark Brothers had filed a complaint with the Commission seeking reparation as damages for alleged discrimination in the distribution of coal cars. Complainant was seeking, not the enforcement of existing rules, but a modification of those rules. Prior to the decision by the Commission, Clark Brothers filed a suit in the state court seeking damages for the same acts. Before the trial in the court, the Interstate Commerce Commission rendered its decision. Clark Brothers, dissatisfied with the result of that decision, sought to pursue the case in the state court. The Commission found that the rules were discriminatory and that plaintiff had been damaged in the amount of $31,127.96. The state court awarded damages with reference to the same acts and the same period in the amount of $124,443. This court held that the express requirement of an election between the proceeding before the Commission and a suit in the Federal Court left no room for the conclusion that there is an option in such case to resort to the state court. The case obviously has no application here.

Mitchell Coal & Coke Company v. Pennsylvania Railroad Co., 230 U. S. 247, 33 S. Ct. 916, 57 L. Ed. 1472, involved the reasonableness of an allowance to shippers of coal for the performance of a substitute transportation service in the switching over the spur tracks of the industry. The Mitchell Coal Company did not receive an allowance for the switching service but the railroad itself performed the switching to and from its mine. The Altoona and other mine companies switched the cars from their mines to the station of the railroad company and received an allowance of 10 cents per ton for the performance of that service. The Mitchel Coal Company contended that the 10 cents per ton was excessive and amounted to a rebate, and also was discriminatory in that the railroad company refused to permit the Mitchell Coal Co. to perform its own switching service and receive an allowance for it. This court pointed out that the case involved first, the reasonableness of the allowance to the Altoona and the other mines and, second, the question of discrimination as between the Altoona and the Mitchell mines. At 230 U. S. 264 this Court stated:

> "For the courts are no more authorized to determine the reasonableness of an allowance for a haul over a spur track, between mine and station, than they are to pass upon the reasonableness of a rate for a haul, over a trunk line, between station and station."

The order sought by the coal company in that case would have required the court to find whether or not the allowance of 10 cents was a reasonable allowance for the

service performed and if not to have fixed a reasonable allowance for the performance of that service. It would also have required the court to have found whether or not failure to make an allowance to the Mitchell Company constituted an unreasonable discrimination and preferential practice under the Act. The case at bar is quite different. We seek only the performance of the transportation duty as defined in the Act at the lawfully published charges on file with the Commission.

Loomis v. Lehigh Valley Railway Co., 240 U. S. 43, 36 S. Ct. 228, originated in an effort to have the railroads furnish grain doors and bulkheads in cars used in the transportation of farm products in bulk. The rate schedules covering the products made no reference to allowances for grain doors or bulkheads. The question presented was whether the court could so modify the existing rules and regulations as to require the carriers to furnish grain doors and bulkheads. In 240 U. S. 43 this Court stated (page 48):

> "No serious dispute exists concerning the facts. The applicable duly filed interstate rate schedules made no reference to allowances for grain doors or bulkheads, and the circumstances under which these were installed, together with their cost, are not controverted. Whether there was jurisdiction in the state court to pass upon the carrier's liability incident to the interstate traffic is the sole point demanding consideration."

The Court points out that the Interstate Commerce Commission had expressly ruled that the carriers could not lawfully, at their own expense, furnish grain doors

and bulkheads, or reimburse shippers for doing so, unless the tariff so provided. It is thus clear that the case involved an effort to have the court legislate with respect to freight rate matters, *i. e.*, to modify published tariffs lawfully on file with the Commission. No such proposition is here involved.

In *Texas & Pacific Railway Company v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, the plaintiff sought reparation on the alleged ground that the railroad company had exacted unreasonable rates for the transportation of cottonseed from Louisiana to Abilene, Texas. The rates were published and on file with the Commission. The published rates were exacted and charged in accordance with the tariff. The transportation service was performed in accordance with the provisions of the Act and the published rates applied.

Such are the six cases cited and discussed by petitioners in support of their application for *certiorari*. These respondents could scarcely have found cases better adapted to demonstrate the inapplicability to the case at bar of the doctrine of preliminary resort to the Commission.

At page 23 of the argument in support of the petition, petitioners challenge the statement of the lower court that no car shortage or emergency existed in the case at bar which renders the carriers unable to comply with a writ of mandamus. Petitioners do not assert that any such car shortage or emergency does exist nor do they point to allegations in their pleadings to that effect.

The argument seems rather to be that the possibility of a car shortage at some time in the remote future negatives the power expressly given to the district court by Section 49 of the Act, heretofore quoted, to issue the writ of mandamus, commanding such common carrier to move and transport the traffic, or to furnish cars of other facilities for transportation. The contention, if approved by this Court, would, of course, completely emasculate the power of the District Court under this section of the Act to compel compliance by any carrier with the common law duty to serve, whatever the circumstances or the reason for the refusal. The contention has been answered, if any answer is needed, by this Court in *Pennsylvania R. R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120, 37 Sup. Ct. 46, 61 L. Ed. 188:

> "It is only in times of car shortage resulting from unusual demands where other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carriers can be regarded as qualifying or affecting the right of the shippers to demand and receive cars, commensurate in number with their need."

The objection that the issuance of the writ would preclude administrative action by the Commission in the event of an actual car shortage in the future is too idle to be considered.

To justify the statement of the lower court, it is only necessary to review the incident of the steel billets. (R. 144.) That shipment was booked to move through the Port of Brownsville. The shipper at Brownsville was

forced to divert it to Corpus Christi because of the refusal of respondents to transport at published rates. At Corpus Christi it was loaded in American railway cars, transported to Laredo, Texas, and there delivered in the American railway cars to the National Railways of Mexico and transported by that carrier to Monterrey, Mexico. Obviously the use of the cars for the transportation through the Port of Brownsville would have created no more car shortage or emergency than was created in connection with the transportation of that identical commodity through the Port of Corpus Christi.

The Port of Brownsville is a new port, opened to commerce May 16, 1936. It has not demanded of the carriers any unusual or abnormal use of American railway equipment. The commodities for which it competes and for which its shippers compete are those that are normally moving to and from the Republic of Mexico. They have been moving and are now moving through other gateways and other ports, and Brownsville is being denied an equal opportunity to participate in the commerce by petitioners' refusal to perform transportation at published rates and to furnish equipment for the performance of that transportation.

At page 23 of the argument the statement is made that a writ of mandamus commanding the Port Isabel to furnish cars would be vain because it owns none, and for that reason, it is asserted, the matter involves a technical question that should be submitted to the Interstate Commerce Commission. Petitioners do not call to

the attention of this Court anything that the Interstate Commerce Commission would have to do in the premises that it has not already done in the car service case which was reviewed by this court. See *Rules for Car Hire Settlement*, 160 I. C. C. 369, 165 I. C. C. 495. There the Commission had under review the rules of the American Car Service Bureau concerning the rental of equipment by short line railways that owned no equipment.

In reviewing the matter in *Chicago, Rock Island & Pacific Railway v. U. S.* 284 U. S. 80, 52 S. Ct. 87, this Court stated:

> "Short lines, as well as trunk lines, participating in joint rates, must furnish their share of equipment. If they do not own cars they must rent them." 284 U. S. at 97.

In the same volume at page 95 this Court stated:

> "The trunk lines as owners furnish in the main all the car equipment used by the short lines."

The *per diem* rules and rates were prescribed by the Commission in amounts designed to produce a reasonable return on the investment. In the car service case at page 378 the Commission stated:

> "The per diem rate is supposed to reflect the average cost, to the owner, of freight car ownership and maintenance, and embraces cost of repairs, cost of taxes, cost of replacement, miscellaneous expenses and six per cent interest on the investment. From the evidence of record, it is estimated that the cost of car ownership maintenance average 83.812c per car day and $305.91 per car unit in the calendar year 1925, and approximately $1.00 per car a day in that year for the period cars were actually in service."

The Commission and this Court have thus reviewed the rules and regulations under which petitioner, Port Isabel line, obtains its equipment. The general manager of the Port Isabel line testified that his line had always operated under these rules and that they were receiving equipment from the respondent Missouri Pacific and other carriers under these rules at the present time. (R. 167-168.) We quote from that testimony:

> "The refusal of the Missouri Pacific and the Southern Pacific related only to the traffic coming to and from Mexico. As to all other traffic, they have continued to furnish us equipment, and we have continued to transport it under the car service rules of the American Association of Railways hereinabove referred to." (R. 169.)

Petitioners assert, at page 24 of their argument, that the effect of a passage in the opinion of the lower court is to require petitioners to establish through routes between points in the United States and points in Mexico. There is nothing in the quoted passage which can possibly be so construed. It refers to "a through movement between the Port of Brownsville and the interchange with the National Railways of Mexico." Compliance with rates between points in the United States consistent with *Lewis-Simas-Jones Co. v. Southern Pacific Co.*, 283 U. S. 654, is all that we have sought, and those rates have long been published and filed with the Commission. Through rates are not essential to the transportation of the commerce which we seek to move.

A statement of petitioners, at page 24 of their argument, seeks to inject into the case some question of pro-

ration of equipment as between petitioner Missouri Pacific lines and petitioner Port Isabel line. It is true as stated in the cases there cited by petitioners that the furnishing of equipment for through transportation is a joint obligation of all carriers participating in the through movement. Here, however, we are concerned with two carriers participating in the through movement. One is necessarily under the joint obligation and owns no equipment. The other is equally subject to such joint obligation and owns and controls all of the equipment. The petitioner owning no equipment has heretofore and is now operating under car service *per diem* rules by which it rents its equipment from trunk line carriers. The trunk line carrier in this instance is refusing to permit the short line owning no equipment to rent equipment under those rules, prescribed by the Commission and approved by this court. If petitioner Missouri Pacific lines should abide by the car service rules and permit the Port Isabel line to obtain its equipment under those rules, that line is ready and willing to rent the equipment to perform the transportation service here involved. (R. 168.) The rules and regulations under which the equipment may be rented have been approved and the tariff containing the interchange rules under which the cars are interchanged as between carriers are on file with the Interstate Commerce Commission. (R. 147-148.)

It is not true, as stated on page 25 of petitioners' argument, that an administrative remedy exists by which complainants may obtain the necessary relief. See *C. S. Wells & Son v. Chicago, Burlington & Quincy*, 161

I. C. C. 145 and *United States v. Pennsylvania Railroad Co.*, 242 U. S. 208, 37 S. Ct. 95. But, even so, the Act (Section 49, Title 49, Chapter 2, U. S. C. A.) specifically provides that:

> "The remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by the preceding chapter."

Petitioners, on page 25, rely strongly upon the dissenting opinion of Circuit Judge Hutcheson. A review of that dissent will show that the concern of the learned judge with the measure of the revenue accruing to the various carriers has obscured the question as to the jurisdiction of the court. We point to the emphasis in the dissent on certain aspects of the case (R. 198):

(1) The Missouri Pacific has no interest in the movement except to perform a switching service.

(2) What is sought here is to compel the connecting carriers to furnish cars which may be needed in Mexico.

(3) There are no joint through rates.

(4) The traffic does not originate on the lines of the Missouri Pacific.

(5) The Missouri Pacific gets no line haul on the traffic.

These matters have no bearing on the jurisdiction of the lower court to enforce published tariffs. Elsewhere in the opinion the learned judge refers to the rates collected by the Missouri Pacific as "meager" and "small." (R. 194-195.) As a matter of fact, the proof on hearing will

show that the rates exacted are among the highest in the United States and particularly that they are the highest being exacted at any point along the Gulf coast. However that may be, the volume of the rate or the method of publication—whether they be called line-haul rates or switching rates—can have no effect upon the jurisdiction of the court to enforce those rates when they are once published and on file with the Commission.

The crucial error in the disenting judge's viewing of the case is the failure to observe the fact that the car service rules were on file with the Commission, that they had been prescribed by the Commission and approved by this Court, and that in the instance of the Port Brownsville the Missouri Pacific has refused to abide by these rules.

Apparently the learned judge overlooked the fact that the filing of the interchange rules with the Interstate Commerce Commission as required by Section 6 of the Act gives such rules the force of law in the same manner that the force of law attaches to the publication and filing of rates with the Interstate Commerce Commission. The dissenting opinion emphasizes that the car service rules of the American Railway Association are "purely voluntary" and that they do not have the force of law. The record shows (R. 148) that the car service rules are on file with the Interstate Commerce Commission; therefore they do have the same force of law as is accorded all publications filed with that commission.

At page 25 of the petition, it is stated:

> "There is something inherently wrong in a demand that an American railroad, operating an intermediate switching line and enjoying no substantial revenue from the transaction, should be required to furnish all of the equipment for the movement of international traffic when the Mexican railroads, the real beneficiaries of the movement, are unwilling to furnish any part of the rolling stock and when the court, which is called upon to enter the order must direct that American railroads, in order to comply with the demands, to send its property out of the jurisdiction of this and every other court of the United States, where it will be subjected to the specific needs of foreign jurisprudence."

That statement is erroneous in substance and in implication. We are not seeking an order from the court commanding these petitioners to send their equipment out of the jurisdiction of the United States of America. We ask only that they be required to transport at published rates. It is a fact, as shown by this record, that the American railways, including the Missouri Pacific line, freely send their cars into and out of the Republic of Mexico, in the handling of traffic to and from all other ports other than the Port of Brownsville. We call attention again to the incident of the steel billets, originally booked to move to the Port of Brownsville, which in fact did move into Mexico in American railway cars through the Port of Corpus Christi. We ask the attention of the Court to Missouri Pacific cars 13200, 71303, 72273 (R. 144), used by the Texas Mexican Railway to transport the steel billets from Corpus Christi to Laredo.

On those cars, the petitioner Missouri Pacific lines, received only the *per diem* as provided for in the car service rules under which all short-line railways operate. It refused to permit the same rules to operate for the purpose of moving traffic through the Port of Brownsville. Those cars, in the normal course of business, were made empty at Monterrey, Mexico, and loaded northbound with traffic coming back into America. (R. 144.) The port of Brownsville is denied an opportunity to participate in that return traffic by the act of the Missouri Pacific in refusing to transport those cars at published rates from the interchange with the National Railways of Mexico to the Port of Brownsville through the gateway of Brownsville. Vague generalities relating to inherent wrongness or rightness cannot avail as defensive argument in a suit to compel the performance by a common carrier of its duty under statute and tariff, but we are struck with the fact that, if there is any aspect of this case calling for the homily of moral judgment, it is the effort of the Missouri Pacific to strangle this port in its infancy. Certainly there is nothing "inherently wrong" in the demands of the Port of Brownsville that does not affect equally and alike the movement of all the traffic through these gateways to and from the Republic of Mexico.

The pleadings and the evidence offered show that this case comes within that line of authorities holding that preliminary resort to the Interstate Commerce Commission is not necessary. This court has recently reviewed the authorities in the case of *Brown Lumber Co.*

v. L. & N. Railway, 299 U. S. 393. Direct resort to the court was there upheld on the authority of the *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U. S. 285. In addition to those two cases, we respectfully ask attention to the following decisions in which this Court has specifically sustained the jurisdiction of the court in matters where only the enforcement of tariff provisions was before the court. See *Pennsylvania Railroad Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120, 37 S. Ct. 46, 61 L. Ed. 188; *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U. S. 121, 35 S. Ct. 484, 59 L. Ed. 867; *Illinois Central Railway Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 35 S. Ct. 760, 59 L. Ed. 1306; *Eastern Railway Co. of New Mexico v. Littlefield*, 237 U. S. 140, 35 S. Ct. 489, 59 L. Ed. 878.

CONCLUSION

In conclusion, we most respectfully submit that the lower court has reached a proper and correct conclusion based upon an accurate statement of the issues and the evidence and that the petition for the writ of *certiorari* should be denied.

A. L. REED,
Attorney for
Brownsville Navigation District of Cameron County, Texas,
F. A. Lallier and J. G. Philen, Jr.,
Respondents.

Dated: Dallas, Texas,
September 14, 1937.

Address: CALLAWAY & REED,
1902 Santa Fe Bldg.,
Dallas, Texas.

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In the

Supreme Court of the United States

October Term, 1937

No. 300

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, GUY A. THOMPSON, TRUSTEE, ET AL.,
Petitioners,

vs.

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

A. B. COLE,
of Rentfro & Cole,
Brownsville, Texas,
A. L. REED,
CARL B. CALLAWAY,
of Callaway & Reed,
Dallas, Texas,
Their Attorneys.

Dated: February 17, 1938.

Address: CALLAWAY & REED,
1902 Santa Fe Building,
Dallas, Texas.

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BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

OPINION BELOW

The opinion of the District Court was not reported. The opinions of the Circuit Court of Appeals are reported in *Brownsville Navigation District, et al., v. St. Louis, B. & M. Railway Co., et al.*, 91 Fed. (2d) 502.

PRELIMINARY STATEMENT

Attention of this honorable court is respectfully directed to the "specifications of errors" as filed by the petitioners in this case. (See pages 8 and 9 of brief for petitioners.) It is not believed that these "specifications of errors" or assignments of errors comply with the rules of this honorable court.

(28 U.S.C.A., Sec. 862; *Local 167 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and*

Helpers of America, et al., v. United States, 291 U. S. 293; *American Surety Company of New York v. Fischer Warehouse Company*, 88 Fed. (2d) 536; *Wallace Wood, Jr., v. A. Wilbert's Sons Shingle & Lumber Co.*, 226 U. S. 384, and *People of the State of New York v. Kleinert*, 268 U. S. 646.)

It is particularly urged that under the "specifications of errors," as filed, and taking into consideration the rules of this honorable court, this court should not at this time consider the matters raised under points 1 and 3 as contained in petitioners' brief. It is our contention that petitioners seek to raise and discuss under these two points matters for which no proper predicate has been laid in this appeal.

Point 1 contained under "Argument" in petitioners' brief is found on page 9 of such brief and point 3 is found on page 26.

STATEMENT OF THE CASE

Petitioners in their brief repeatedly placed the respondents in the position of relying upon contentions upon which the respondents do not rely, insofar as this appeal is concerned.

In order that our position may be clearly understood, we point out as follows:

1. Respondents do not raise and do not rely, in any manner whatsoever, upon any question of discrimination in any published rule or rate of either of the Petitioner Carriers.

2. Regardless of the duty of Respondent Carriers, *under rates and car service rules on file with the Interstate Commerce Commission*, to permit the carrying of their equipment into a foreign country, respondents insofar as this appeal is concerned do not rely upon any contention that there is any obligation on either of the petitioner railroads to furnish equipment for movement into a foreign country, viz. Mexico.

Respondents in the lower court complained of two things:

a. The failure and refusal of the carriers to transport, under rates and regulations published and on file with the Interstate Commerce Commission, shipments in cars owned by other carriers, which cars were loaded and tendered to them for shipment.

b. The failure of the petitioner carriers to furnish transportation (including equipment) as defined in Section 1 (3) of the Interstate Commerce Act, for shipments of respondents, under rates and regulations published and on file with the Interstate Commerce Commission.

The shipments referred to in both (a) and (b) above were shipments originating at a point in the United States, destined to a connection with the National Railways of Mexico at the international bridge.

The only question presented on this appeal is the jurisdiction of the District Court under Section 49 of the Interstate Commerce Act (Art. 49, Title 49, U. S. C.A.) to issue a mandamus commanding that petitioners

perform their transportation duties as defined in Section 1 of the Interstate Commerce Act, Title 49, U. S. C. A.) under rates published and on file with the Interstate Commerce Commission.

In this connection the Circuit Court of Appeals in its opinion in this case stated as follows:

> "The sole question presented on this appeal is the jurisdiction of the district court to issue a writ of mandamus requiring appellees to perform their transportation duties *under rates published and filed with the Interstate Commerce Commission.* (Italics ours.)

We cannot accept the statement of the case as submitted by the petitioners and therefore briefly outline the case as follows:

The Brownsville Navigation District of Cameron County, Texas, (hereinafter referred to as the Port of Brownsville) is a port navigation district similar in every respect to those existing at other Texas ports, such as Corpus Christi, Houston, etc. The Port of Brownsville was incorporated under the laws of the State of Texas for the purpose of creating a navigation district in Cameron County, Texas. For that purpose the taxpayers of the Port of Brownsville in conjunction with the United States Government invested $5,788,630 in the dredging of a canal from Brazos, Santiago Pass, to the turning basin, about 5 miles from the center of Brownsville. Of this amount $2,853,000 was paid by the taxpayers and citizens of the Port of Brownsville. There is some $740,000 invested in facilities at the turning

basin for the purpose of affording the necessary means of interchange of commodities and commerce between land and water carriers. The ship channel thus constructed is 17 miles long and the turning basin is 5 miles from the geographical center of the city of Brownsville (R. 4-5). The Port of Brownsville was opened to the commerce of the nation on May 16, 1936 (R. 102).

Respondents, F. A. Lallier and J. G. Philen, Jr., are shippers' agents, forwarding agents, freight brokers and stevedores engaged in the business of handling freight at the Port of Brownsville for transshipment by water and for transportation by railroad to and from the Republic of Mexico, as well as to and from origins and destinations in the United States (R. 130-137). (Hereinafter called shippers' agents).

Petitioner, the St. Louis, Brownsville and Mexico Railway Company, Guy A. Thompson, Trustee, operates a railroad from Houston through several counties into Brownsville, Texas. It serves the ports of Houston, Corpus Christi and Brownsville (R. 106-80a). This carrier is operated by Guy A. Thompson, Trustee, as the result of a proceeding in the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, Cause No. 6935, a Proceeding for the Reorganization of a Railroad (R. 3). That court, having granted permission to sue the trustee in the District Court of the Southern District of Texas in the matter here presented to the court (R. 23). (Hereinafter called the Missouri Pacific.)

The petitioner, Port Isabel & Rio Grande Valley Railway, is a corporation organized under the laws of the State of Texas with headquarters at Brownsville, Cameron County, Texas, and it operates a railroad approximately 26½ miles long between Brownsville and Port Isabel, wholly in Cameron County, Texas. It has a switch connection with the facilities at the turning basin of the Port of Brownsville and it connects with petitioner, Missouri Pacific, at Brownsville and forms a connecting line of transportation from the Port of Brownsville to the interchange with the National Railways of Mexico in the City of Brownsville (R. 6-7). (This petitioner will hereinafter be called the Port Isabel line.) See also R. 70-a for a graphic description of the location of the turning basin, the line of the Port Isabel Railway and that of the Missouri Pacific and its connection with the National Railways of Mexico at Matamoros. The bill of complaint (R. 2-19) alleges:

1. That the defendants are refusing to transport the commodities handled through the Port of Brownsville between that port and the interchange with the National Railways of Mexico through the gateway of Matamoros, Tamaulipas, Mexico. (Par. VI, R. 12; Par. VII, R. 13-14; Par. XIV, R. 17.)

2. That defendant, Missouri Pacific, has always had and does now have joint arrangements for the through movement of traffic into and out of Mexico and for the interchange of American railway equipment as between that defendant and the National Railways of Mexico for such through transportation (Par. IV, R. 10).

3. That there are lawfully published rates on file with the Interstate Commerce Commission covering the transportation of the commodities here involved between the Port of Brownsville and the interchange with the National Railways of Mexico at the gateway of Matamoros, Tamaulipas, Mexico, and the gateway of Brownsville, Cameron County, Texas (Par. II, R. 7-8).

4. That defendants are refusing to transport the commodities or to furnish equipment for their transportation under the lawfully published rates on file with the Interstate Commerce Commission (Par. II. R. 9; Par. VI, R. 12; Par. VII, R. 13-14; Par. VIII, R. 14; Par. XIV, R. 17).

5. It is alleged that the shippers and respondents have at all times tendered the commerce to the defendant carriers and expressed their willingness and readiness to pay the lawful published rates for the transportation thereof between the Port of Brownsville and the interchange with the National Railways of Mexico at Matamoros, State of Tamaulipas (Par. XII, R. 16).

6. It is alleged that petitioner, Missouri Pacific, is operating under the existing joint arrangements for the interchange of traffic with the National Railways of Mexico through other ports and other gateways, but is refusing and declining to accord to the shippers and the Port of Brownsville the same treatment and the same benefits of existing arrangements for such interchange and transportation (Par. IV, R. 10).

7. That the Missiouri Pacific is furnishing equipment to other ports and other gateways for transportation into Mexico under its joint interchange arrangements with the National Railways of Mexico and is declining to furnish equipment for the same purpose to the Port of Brownsville (Par. VI, R. 12).

8. That the Missouri Pacific declined to permit defendant, Port Isabel Railway, to load equipment that was already in its possession and already at the Port of Brownsville for the transportation of commodities from the Port of Brownsville to the interchange with the National Railways of Mexico (Par. VII, R. 13-14).

9. The prayer for relief asked that the district court grant an order for the issuance of a writ of mandamus commanding said respondents:

a. To move and transport the traffic herein described, and

b. To furnish adequate and sufficient cars for its transportation to and from and between Matamoros, Tamaulipas, Mexico, and the Port of Brownsville, Cameron County, Texas (Par. XVIII, R. 19).

THE EVIDENCE SUBMITTED TO THE LOWER COURT SUSTAINED THE ALLEGATIONS OF RESPONDENTS

We shall give only a few illustrations of the evidence which is undisputed with respect to the refusal to trans-

port at published rates and the refusal to furnish equipment for transportation.

1. The instance of the steel billets originally booked for movement through the Port of Brownsville into Monterrey, Mexico, were diverted to Corpus Christi by reason of the refusal of the petitioners to transport. At Corpus Christi, petitioner, Missouri Pacific, permitted its equipment to be loaded and transported by the Texas-Mexican Railway from Corpus Christi to Laredo and there delivered to the National Railways of Mexico for transportation to Monterrey, Nuevo Leon, Mexico. The specific car numbers showing the American cars in which the steel billets moved are set forth in the evidence (R. 104-105).

2. When these same cars (R. 104-105) reached their destination in Mexico and were made empty, they could be reloaded for the transportation of commodities to any American gateway or port except the Port of Brownsville; because the Missouri Pacific refused to transport such cars upon arrival at the gateway of Matamoros-Brownsville (R. 105-106).

3. The bill alleges that the shippers tendered loaded cars to petitioners, and gives car numbers showing cars loaded at the Port of Brownsville by shippers seeking to use that port, which were tendered to petitioners for transportation under published rates and it alleges that petitioners refused to transport such cars containing such commodities (R. 13-14). The evidence specifically sustained this allegation (R. 110-111).

4. It is not denied that the National Railways of Mexico are parties to a tariff on file with the Interstate Commerce Commission providing for interchange between the American railroads and that carrier, and that these tariffs provide for that interchange at all gateways, including the gateway of Brownsville-Matamoros (R. 107; R. 128).

5. It is not denied that the tariffs covering the transportation charges between Port Brownsville and the interchange with the National Railways of Mexico at the International Bridge are lawfully on file with the Interstate Commerce Commission, and that they do provide for the necessary charges for such transportation (R. 115-123).

PETITIONERS FILED PLEA TO JURISDICTION OF THE COURT AND IT SUSTAINED THAT PLEA

Petitioners filed a plea to the jurisdiction of the court, contending that it was a matter that required initial submission of the question involved to the Interstate Commerce Commission, and that the District Court had no jurisdiction to require the petitioners to perform their transportation duties (R. 25, 32).

The district court in a memorandum opinion sustained that plea and held that the matter involved was one of an administrative nature to be submitted to the Interstate Commerce Commission (R. 39).

Respondents petitioned for appeal, which was granted (R. 43, 45).

The majority of the Circuit Court of Appeals for the Fifth Circuit reversed the judgment dismissing the petition and remanded the case to the District Court for further proceedings (R. 141-152).

SUMMARY

We will attempt to answer the argument of petitioners in substantially the form and order in which it is submitted in their brief. Our argument wil cover the following points:

A. That respondents are entitled to receive from the petitioner carriers transportation service from the Port of Brownsville to the international bridge, this service to be rendered under rules and regulations filed by said carriers with the Interstate Commerce Commission.

B. That such transportation service includes both the actual movement of loaded cars, either belonging to the petitioner carriers or other railroads, and also the furnishing of equipment for such transportation service.

C. That the service to which the respondents are entitled and the demands made upon the carriers for such service involve only the performance by the carriers of acts which they are obligated to perform under tariffs which they have filed with the Interstate Commerce Commission and do not involve in any manner whatsoever any interpretation of such tariffs or any administrative questions.

D. Mandamus is a proper remedy in this case.

ARGUMENT

In the beginning, we desire to direct particular attention of the court to three things.

1. The record in this case shows not only that the petitioner carriers refused to furnish equipment to the respondent shippers for the transportation of commodities, but that they also refused to transport for the benefit of such shippers loaded cars owned by railroads other than the petitioner carriers which were tendered to the petitioner carriers at the Port of Brownsville and which had been moved into the Port of Brownsville.

Specific instances of this are shown by the letter from the Missouri Pacific and Southern Pacific to the Rio Grande attached to the affidavit of Mr. F. W. Hofmokel (R. 111) where it is definitely stated that in regard to cars not belonging to petitioner carriers "we cannot accept the cars loaded for points in Mexico without the authority of officials of the lines delivering the cars to us." In the case of car MP 83054 loaded with sheet steel, and other instances, shippers endeavoring to use the Port of Brownsville have been requested and forced by petitioners to unload cars because of the refusal of petitioners to transport them. (R. 110.)

2. The shipments involved, whether in cars owned by the petitioner carriers or by other railroads, were shipments to be moved from the Port of Brownsville to a connection at the international bridge.

3. The actual tariff covering such shipments is shown in the record at page 94 and reads in part as follows:

> "Commodities * * * all carload freight, except as otherwise shown, to or from points in Mexico * * * BETWEEN * * * (c) interchange connections with other lines * * * AND * * * interchange connection of the StLB&M Railway with the Brownsville & Matamoros Bridge Company."

It is the contention of the respondents that the only thing involved in this case is the enforcing of this tariff of the petitioner carriers and that for this reason there is no administrative matter of any kind whatsoever involved requiring submission to or decision by the Interstate Commerce Commission of any preliminary question. It is further our contention that under Section 1, Paragraph 3 of the Interstate Commerce Act, the transportation service to which respondent shippers are entitled under the above mentioned tariff includes both the actual transportation of cars and the furnishing of equipment.

We call attention to the fact that the allegations of the bill of complaint show that the appellees are connecting carriers (R. 7). That the commerce which appellants seek to have transported over their joint line is a through movement between the Port of Brownsville and the interchange with the National Railways of Mexico (R. 10-12). That both appellees have published and on file with the Commission tariffs naming per car charges for such through transportation (R. 7, 8). Therefore, there is a through route composed of the two lines of railway. The

through rate is composed of two separately published factors but it is none the less a through rate and the mere fact that the through rate for the through transportation is composed of the combination of the separately established local rates does not affect the joint responsibility for the through transportation. See *Atlantic Coastline Railway Company v. Smith Bros.*, 63 Fed. (2d) 747, certiorari denied 289 U. S. 761. At 748 in that opinion the court states that the rule of the Interstate Commerce Commission, fixing joint responsibility for violations of the act for through routes where there are only combination of local rates, has the approval of the courts. The court thereafter cited the following cases in which that rule of the Commission had been approved:

Louisville & Nashville Railway Co. v. Sloss-Sheffield Steel & Iron Co., 269 U. S. 217.

News Syndicate Co. v. New York Central Railroad Co., 275 U. S. 179.

Lewis-Simas-Jones Co. v. Southern Pacific, 283 U. S. 654.

Kanawha Black Band Coal Co. v. Chesapeake & Ohio Railroad, 197 W. Va. 469.

The opinion of the court in the Smith Brothers case above cited was cited with approval by the fourth Circuit Court of Appeals in *Atlantic & Y. Railway Co. v. Carolina Button Corp.*, 74 Fed. (2d) 870.

Section 6, paragraph 1 of the Act specifically defines through routes in connection with which combination of

local rates are established and collected. That section provides as follows:

> "Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate has been established. *If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation.*" (Italics ours.)

Referring specifically to this section, this Court in *Kansas City Southern Ry. Co. v. Albers Commission Co.*, 223 U. S. 573, (p. 597) stated:

> "In every substantial sense, local rates and joint through rates were placed on the same level."

In the case of *U. S. v. Illinois Central Ry.*, 263 U. S. 515, the specific question was passed on as to whether or not discrimination under the statute by connecting carriers was affected by the manner of publishing the rates. In that case, the question presented was whether or not the Illinois Central Railroad could be held responsible for the discrimination since it charged only its separately established factor and since the short line railway connecting with it charged its separately established fac-

tor. Speaking for the court, Mr. Justice Brandeis at page 527 stated:

> "The rate to the short line point is not a joint rate, but a combination of the trunk line rate to the junction and the short line local rate. The distinction is without legal significance in this connection. A through route was established; and the transportation is performed as the result of this arrangement between the carriers, express or implied."

REPLY TO PETITIONERS' POINT I

The argument made by petitioners to the effect that furnishing the services demanded by respondents would result in transportation to points outside of the United States is not tenable. All of the services that petitioners would be required to render would be rendered in the United States. Even if, after such services have been performed, the cars might be taken into a foreign country (with the consent of petitioner carriers or under the Car Service Rules of the Association of American Railroads on file with the Interstate Commerce Commission) petitioners will not be allowed for this reason, to evade the provisions of the Interstate Commerce Act and their common law duty in this regard. The cases of *News Syndicate Co. v. New York Central Railway Company*, 275 U. S. 179 and *Lewis-Simas-Jones Company v. Southern Pacific Co.*, 283 U. S. 654, hold that regardless of the fact that part of the transportation might occur without the boundaries of the United States, the carriers are obligated to perform their lawful duties in regard to the transportation service within the United States.

Petitioners have attempted to distinguish these cases on the ground that the rates involved herein are not joint through rates but are separately established rates. Again, the position taken by petitioners is, under the law, not tenable.

These authorities show that carriers cannot defeat their obligations by refusing to join in the tariff of the connecting lines and thereby calling the total sum collected a combination of local switching rates rather than through or joint rates.

REPLY TO PETITIONERS' POINT II

The basis of this appeal is presented in petitioners contention that the question before the court is an administrative one and not subject to the orders of the court before recourse is had to the Interstate Commerce Commission.

The only issue presented to the court is the duty of petitioners to transport commodities tendered them at the published rates lawfully on file with the Commission. Related to that is the matter of furnishing cars for such transportation. Does the duty to transport include the duty to furnish equipment for such transportation? There is no dispute that respondents have tendered to petitioners commodities to be transported and that there are tariffs on file with the Intersate Commerce Commission providing for the transportation for which the respondents have asked. We presume that petitioners are willing to accept as a brief and true statement of their case the opinion by Hutcheson, Circuit Judge, who dis-

sented from the opinion of the majority. He says in summing the case this:

> "But this evidence was not needed, for he (the trustee) admits, indeed insists, that he has not furnished, and does not intend to furnish, cars for this movement. He denies that there is any law or regulation which compels him to, and insists that it is not discrimination to furnish cars for Mexican shipment where his road gets a line haul, and to refuse to furnish them where it gets only a meager switching charge." (Parenthetical part ours.)

We submit to the court that the amount of revenue realized or the length of haul petitioners would perform is no criterion, but the question is: Do they have a tariff or common law duty providing for them to render this service? If so, have they refused to perform the service?

Section 1, paragraph 3 of the Interstate Commerce Act (Title 49, U. S. C. A.), defines the term transportation as follows:

> "The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Section 1, paragraph 4 of the Interstate Commerce Act (Title 49, U. S. C. A.), states:

> "It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor."

Thus definitely petitioners are under a duty to furnish transportation upon reasonable request and that transportation includes locomotives, cars and other vehicles. This has been upheld in numerous cases. See *Southern Railway Co. v. D. L. Reid, et al.*, 222 U. S. 424; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Edward Dettlebach*, 239 U. S. 588. The same interpretation has been placed upon the act by the state courts. *Atchison, Topeka & Santa Fe Ry. v. Smyth*, 189 S. W. 70; *Ft. Worth & Denver City Railway Co. v. Strickland*, 208 S. W. 410.

It is alleged in the original bill that petitioners have published tariffs covering the transportation to and from the interchange at the international bridge and the Port of Brownsville composed of separately established rates of $3.15 per car by the Missouri Pacific lines and $8.10 per car by the Port Isabel line. These tariffs are on file with the Commission covering the transportation of the commodities which respondents seek to have transported by petitioners (R. 7-8). Petitioner Missouri Pacific lines has joint tariff arrangements with the National Railways of Mexico for the interchange of traffic over the international bridge at Brownsville and there are published charges on file with the Interstate Commerce Commission covering this interchange (R. 8). This is not denied. With petitioners having a clear duty to perform the transportation for which they have tariffs on file and the clear wording of the Interstate Commerce Act and the opinions of the Courts that transportation in-

cludes the furnishing of equipment, there can be nothing else involved in this suit other than the question of whether the district court can require a carrier to perform service which it has stated in its tariff that it will perform and which, under the terms of the Interstate Commerce Act and by virtue of its common law duty, it is obligated to perform. The Federal Courts are the only authority which can act in this situation. Acting upon such a case does not require any inquiry into the question of the reasonableness of the rates or regulation or charge. Respondents have at all times been ready, willing and able to pay the tariff charges of petitioners and have never questioned them as being unreasonable or prejudicial. Respondents seek to require performance under a rule, rate or practice promulgated and filed with the Interstate Commerce Commission which is fair and reasonable on its face. This is a judicial question. The Interstate Commerce Commission held in *C. S. Wells & Son v. Chicago, Burlington & Quincy Railroad*, 161 I. C. C. 145 that it does not have jurisdiction in a situation as is presented in the instant case. The same conclusion was reached by this court in *United States v. Pennsylvania Railroad Co., 242 U. S. 208*. Jurisdiction over such suit is in the State or Federal Court. *Pennsylvania Railroad Co. v. Puritan Coal Co., 237 U. S. 121.*

The case of *Pennsylvania Railroad Co. v. Puritan Coal Co.* will hereinafter be discussed in detail.

We pass to a discussion of the cases cited and quoted from in the argument of petitioners.

The first case cited by the petitioners is that of *Great Northern Railway Company v. Merchants Elevator Company*, 259 U. S. 285. The facts as stated by the court in that case, however, definitely establish it as an authority for the position assumed by respondents. They are fully stated as follows: (p. 288)

> "This action was brought by the Merchants' Elevator Company in a state court of Minnesota against the Great Northern Railway Company and the Director General to recover $80 alleged to have been exacted in violation of the carrier's tariff. That sum had been demanded by the carrier, under Rule 10 of its tariff, as a reconsignment charge, at the rate of $5 a car, for 16 cars of corn shipped from points in Iowa and Nebraska to Willmar, Minn., and after inspection there rebilled to Anoka, a station beyond. The tariff rate from the points of origin via Willmar to Anoka was the same as to Willmar. Willmar had been named as destination in the original bill of lading, only because it is the place at which grain coming into the state by this route is inspected and graded under the laws of Minnesota and of the United States, and the carrier knew, or should have known, that fact. Immediately after inspection, disposition orders were given, and the original bills of lading were surrendered in exchange for billing to Anoka. Rule 10 read:
>
> " 'Diversion of reconsignment to points outside switching limits before placement: If a car is diverted, reconsigned or reforwarded on orders placed with the local freight agent or other designated officer after arrival of car at original destination, but before placement for unloading, * * * a charge of $5.00 per car will be made if car is diverted, reconsigned or reforwarded to a point outside of switching limits of original destination'."

> "The shipper contended that the case was within the exception known as exception (a), as amended by supplement 1, which provided that rules (including Rule 10) shall not apply to: '(a) Grain, seed (field), seed (grass), hay or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto.'
>
> "Whether the charge was payable depended solely upon a question of construction; that is, whether the body of the rule or the exception to it applied. On this question there was room for reasonable difference of opinion. The carrier, relying particularly upon Texas & Pacific Ry. Co. v. American Tie & Timber Co., 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255, and Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43, 36 S. Ct. 228, 60 L. Ed. 517."

After the court had concluded the comparison of these cases with the case before it, it stated its conclusion with respect to the matters involved as follows: (p. 294)

> "In the case at bar the situation is entirely different from that presented in the American Tie & Timber Co. Case, or in the Loomis Case. Here no fact, evidential or ultimate, is in controversy, and there is no occasion for the exercise of administrative discretion. The task to be performed is to be determined by the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary."

In a like manner, the only situation presented to this court is, first, whether or not there is a duty resting upon appellees to transport the commodities tendered

them by appellants. That question is determined by an examination of the provisions of the act and the published tariffs lawfully on file with the Commission. No need exists for any other examination or the establishment of any other facts. Appellants do not seek to have any tariff rate, rule or regulation changed or any established.

The next case cited is that of *Texas & Pacific Railway Company v. Abilene Cotton Oil Company*, 204 U. S. 426. That case involved a question of the lawfulness of existing rates, rules and regulations. It didn't involve the obligation of the carriers to transport commodities tendered them under published tariffs. It was an attack upon the published rate as unreasonable. In other words, the discrimination, preference and unreasonableness complained of did not grow out of a refusal to comply with the published rate, but grew out of the rate itself, and in order to effect relief it was necessary for the court to legislate a new and reasonable rate based upon plaintiff's evidence in that case. Plaintiff had paid only the published and legal rate. Its commerce had moved on the published and legal rate. The relief sought was a lower rate than that contained in the published tariff.

In the instant case, we are seeking only to have the respondent carriers perform their transportation duty and appellants are ready and willing and have at all times tendered to respondents their lawfully published charges for such transportation. The opinion in the *Abilene Cotton Oil case* shows that it cannot possibly

have any connection whatever with the situation here presented to the court. We call attention to the following quoted from that opinion (p. 430):

> "The oil company, the defendant in error, sued to recover $1,951.83. It was alleged that, on shipments of car loads of cotton seed, made in September and October, 1901, over the line of the defendant's road from various points in Louisiana east of Alexandria, in that state, to Abilene, Texas, the carrier had exacted, over the protest of the oil company, on the delivery of the cotton seed, the payment of an unjust and unreasonable rate, which exceeded, in the aggregate, by the sum sued for, a just and reasonable charge. There were, moreover, averments that the rate exacted was discriminatory, constituted an undue preference, and amounted to charging more for a shorter than for a longer haul. Besides a general traverse, the railway company defended on the ground that the shipments were interstate, and were, therefore, covered by the act of Congress to regulate commerce. It was averred that, as the rate complained of was the one fixed in the rate sheets which the company had established, filed, published, and posted, as required by that act, the state court was without jurisdiction to entertain the cause, and, even if such court had jurisdiction, it could not, without disregarding the act to regulate commerce, grant relief upon the basis that the established rate was unreasonable, when it had not been found to be so by the Interstate Commerce Commission."

The next case cited is *Baltimore & Ohio Railroad Company v. U. S.*, 215 U. S. 481. It likewise involved litigation to modify or change for the benefit of the Pitcairn Coal Company the existing established and published rules governing the distribution of coal cars in time of car shortage. It, therefore, involved both paragraphs

12 and 15 and not paragraphs 3 and 4 of the act. The Court stated (p. 482):

> "To decide the merits of this case will require us to determine the legality of the regulations of the B. & O. Railroad Company by which that company distributed cars to coal mines along the line of its road in case of car shortage."

The legality of the regulations themselves constituted the merits of that case. It was not a proceeding to enforce the regulations fair on their face. It was admitted that Pitcairn received all the cars to which it was entitled under the established regulations of the B. & O. Railroad. The court described the regulations of the B. & O. Railroad in great detail and later on, with respect to these regulations it stated (p. 495):

> "But the reports of the Interstate Commerce Commission show that, on a complaint made to that body on the subject of the system of mine rating of the Baltimore & Ohio Railroad Company, the Commission, before the decision of the circuit court of appeals in this case was announced, had expressly refused to hold that the system was either preferential or prejudicial within the act to regulate commerce. In that report, speaking of the Baltimore & Ohio system of mine rating, it was said (14 Inters. Com. Rep., p. 94):
>
> " 'This method of rating mines was adopted by the defendant in 1902, after a careful examination of the various systems in force on other lines. It was intended as a compromise between ratings based on physical capacity only and ratings based on commercial capacity only.'

"And after elaborately weighing the matter, it was said (p. 95):

"'In combining the two systems, the defendant has adopted a middle ground, apparently upon the thought that neither the physical nor the commercial capacity is always a fair test. We are not prepared, on this record, to say that there is no force in that view, and that a system of mine rating based upon a combination of the physical and commercial capacities of the several mines does not more closely approximate the actual car requirements of the mines than a system based upon physical capacity only'."

That case arose under Section 1, Paragraph 12 (Title 49, U. S. C. A.) That paragraph of Section 1 relates wholly to the distribution of coal cars. It provides as follows:

"It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States."

Under that paragraph the carriers were required to establish and publish reasonable rules with respect to the distribution of coal cars. These rules had been published and the Pitcairn Coal Company were dissatisfied with such rules as they were published. It sought to change these rules by a proceeding in the court and necessarily the Supreme Court held that the matter of prescribing just and reasonable rules and regulations to conform to the provisions of Paragraph 12, Section 1, constituted an administrative question and that jurisdiction resided only in the Commission and not in the courts. There is no such question presented here.

The next case cited by petitioners is *Morrisdale Coal Company v. Pennsylvania Railroad Company*, 230 U. S. 304. It involved the reasonableness of existing and published car service rules that had been filed with the Interstate Commerce Commission in compliance with the provisions of Paragraph 12, Section 1, of the act hereinabove quoted. The coal company sought to have the court issue an order requiring the railroad to modify its rules and regulations so that in the distribution of coal cars, as required by that paragraph of the act, privately-owned equipment would be counted and deductions made in the distribution of railroad-owned equipment because of the supply of privately-owned cars available to certain coal mines. The rules published and on file with the Commission did not require the counting of privately-owned

equipment. The court in discussing the facts of that case stated (p. 309):

> "When there was a car shortage, the Pennsylvania Railroad allotted to eah mine a percentage of cars assigned to the district, calculated according to the capacity of the mine.
>
> "On this basis the Morrisdale Coal Company was entitled to about 4.8 per cent and the Berwind-White Company to about 18 per cent."

further (p. 311):

> "Plaintiff admitted that if the Berwind-White Company was entitled to the use of their private cars, without counting them against what it was entitled to under the percentage, then the Berwind-White Company did not get an excess of their percentage. It further admitted that if fuel cars of the Pennsylvania Railroad, and fuel cars of foreign railroads, consgned to particular mines, were not to be counted against such mines, then plaintiff had no cause of complaint, inasmuch as it had received its percentage of the balance or System cars."

With reference to this situation the court stated (p. 313):

> "In view of the decision in the Abilene, Pitcairn and Robinson Cases it is unnecessary again to discuss the statute, or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable.
>
> "The plaintiff, however, seeks to take the case out of the principle of those decisions, insisting that this is a suit for damages occasioned by a violation of the rule; and that, therefore, without any order of the Commission, it is entitled to institute a suit for the recovery of damages resulting from

the failure to distribute cars according to the method established by the railroad itself. The record, however, does not sustain this position, for the evidence does not show any breach of the rule or any failure to deliver to the Morrisdale Company all of the cars to which it was entitled under the method of allotment in force between 1900 and 1906. On the contrary, it was admitted at the hearing that there had been no discrimination against the plaintiff in the application of the rule, the complaint being that the basis of allotment was unreasonable, and that *all cars in the district* should be distributed according to the capacity of the mine, without deducting private cars, foreign fuel cars, or the carrier's own fuel cars. Whether this should be done as a general rule, or under the peculiar conditions prevailing on defendant's road at that time, was, as we have seen, an administrative question, and to be decided by the Commission as preliminary to the right to maintain this suit. The circuit court rightly held that until this was done it had no jurisdiction as a Federal court of the cause of action sought to be enforced.'" (Italics ours.)

The question submitted to the court below did not ask that any rule, regulation, rate or tariff be in any way modified or changed. Therefore, the *Morrisdale Coal Company case* is not applicable and has no bearing upon the issues here involved.

The next case citd by the petitioners is that of *Pennsylvania Railroad Company v. Clark Bros. Coal Mine Company*, 238 U. S. 456. It involved the question of the effect of electing to pursue remedies. The question involved was whether or not Clark Bros. could pursue its remedy before the Interstate Commerce Commission under Section 9 and also at the same time prosecute a proceeding in a

state court involving the identical matter that was presented to the Commission. In that case Clark Bros. had filed a complaint with the Commission seeking reparation as damages for the alleged discrimination in the distribution of coal cars. Prior to the decision by the Commission, Clark Bros. also filed a suit in the state court seeking damages for the same acts. Before the trial in court the Interstate Commerce Commission rendered its decision. Clark Bros. being dissatisfied with the results of that decision, sought to pursue the case in the state courts. The court held that the decision of the Commission was binding and that neither the state courts or any other court could reach a different conclusion and award more damages than those fixed by the Commission in its opinion and order. The entire question presented in the case related, however, not to the enforcement of the existing rules, but sought to obtain a modification of the rules for the benefit of Clark Bros. Coal Mining Co. The Interstate Commerce Commission found that the rules were discriminatory and that plaintiff had been damaged in the amount of $31,127.96. The state court awarded damages with reference to the same acts and the same period in the amount of $124,443.00. With reference to Section 9 of the Act and the real point involved, namely, the election of remedies, the court stated (p. 470):

> "This provision defines the remedies to which a person in the situation of the plaintiff is entitled, and the terms of the provision clearly indicate that these remedies are exclusive. The express requirement of an election between the proceeding before

> the Commission and suit in the Federal court leaves no room for the conclusion that there is an option in such case to resort to the state court."

That case is not applicable to the situation here under consideration and it does not dispose of the issues presented to the court below in the petition of respondents.

The next case cited is that of *Mitchell Coal & Coke Company v. Pennsylvania Railroad Company*, 230 U. S. 247. It involved the reasonableness of an allowance to shippers of coal for the performance of a substitute transportation service in the switching over the spur track of the industry. The Mitchell Coal Company did not receive an allowance for the switching service, but the railroad itself performed the switching to and from its mine. In the case of the Altoona Mines and others, the mine companies switched the cars from the mines to the station of the railroad company and received an allowance of 10c per ton for the performance of that transportation service. The Mitchell Coal Company contended that the 10c per ton was excessive and amounted to a rebate and also contended that it was discriminatory; because instead of making an allowance to the Mitchell Coal Company the railroads were performing the service. The court pointed out that the case involved first the reasonableness of the allowance to the Altoona and the other mines (p. 264):

> "For the courts are no more authorized to determine the reasonableness of an allowance for a haul over a spur track, between mine and station, than they are to pass upon the reasonableness of a rate for a haul, over a trunk line, between station and station."

The order sought by the coal company in that case would have required the court to find whether or not the allowance of 10c was a reasonable allowance for the service performed and, if not, to have fixed a reasonable allowance for the performance of that service. It would also have required the court to have found whether or not the failure to make an allowance to the Mitchell Company constituted an unreasonable discrimination and preferential practice under the act. We have presented no such proposition as that to this court.

The next case cited is that of *Loomis v. Lehigh Valley Railroad Company*, 240 U. S. 43. It involved the question of requiring the railroads to furnish grain doors and bulkheads in cars used in the transportation of form products in bulk. The rate schedules covering the products made no reference to allowances for grain doors and bulkheads. The question presented was whether the court could so modify the existing rules and regulations as to require the carriers to furnish grain doors and bulkheads. Necessarily this required the court to legislate with respect to the existing rules and regulations and to isue an order that would require the carriers to modify and change their existing rules so that they would require the carriers to furnish grain doors and bulkheads. The court stated (p. 48):

> "No serious dispute exists concerning the facts. The applicable duly-filed interstate rate schedules made no reference to allowances for grain doors or bulkheads, and the circumstances under which these were installed, together with their cost, are not controverted. Whether there was jurisdiction in

> the state court to pass upon the carrier's liability incident to the interstate traffic is the sole point demanding consideration."

The Interstate Commerce Commission had expressly ruled that the carriers in connection with their interstate tariffs could not at their own expense furnish grain doors and bulkheads. We quote (p. 50):

> "On June 1, 1908, before this proceeding was begun, the Interstate Commerce Commission ruled: 'A carrier may not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars unless expressly so provided in its tariff.' (Conference Ruling No. 78.)"

Since the Commission had ruled that the tariffs must contain specific provisions with respect to the furnishing of grain doors and since it was an admitted fact in that case that the published tariffs did not so provide, it is clear that the *Loomis Case* involved a proposition of the court legislating with respect to freight rate matters. In the instant case there is no modification whatever needed in connection with the existing rules, rates and regulations. The carriers are operating under their existing rules and are furnishing equipment and transporting the commodities which would otherwise move through the Port of Brownsville except for the reason that petitioner, Missouri Pacific, has refused to transport these commodities under the published rates.

One of the most recent decisions of this court was in *P. P. Brown & Son v. Louisville & Nashville Ry.* 299 U. S. 393. The same contention was made in that case

that is now made by petitioner and the court answered it as follows (p. 398):

> "The shippers contend that the construction given to the rule by the commission is conclusive, because preliminary resort to the commission was necessary. Texas & Pacific Ry. Co. v. American Tie & Timber Co., Ltd., 234 U. S. 138, 34 S. Ct. 885, 58 Ld. Ed. 1255; Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43, 36 S. Ct. 228, 60 L. Ed. 517; Northern Pacific Ry. Co. v. Solum, 247 U. S. 477, 38 S. Ct. 550, 62 L. Ed. 1221. They argue that such preliminary resort was necessary, since the interpretation and application of the rule involved (a) the exercise of sound administrative discretion as to technical and intricate matters of tariff application and the relation of tariffs one to another; (b) the reasonableness of a practice of routing as between higher and lower-rated routes; and (c) uniformity in the application of rates, which is the paramount purpose of the Interstate Commerce Act. But that argument is not sound. To determine whether the rule was applicable to the several shipments does not call for, or indeed permit, the consideration of any of these matters. The simple question for decision, as to each shipment, is whether there existed 'published through rates' 'in effect from point of origin to destination,' the determination of that question requires ordinarily merely the examination of the tariffs. The inquiry would, in all respects be like that commonly made by courts when called upon to construe and apply any other document. This is not a case like Standard Oil Co. (Indiana) v. United States, 283 U. S. 235, 238, 239, 51 S. Ct. 429, 430, 75 L. Ed. 999, where there was required 'consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use.' Here, the shippers might have brought their action at law without resort to the commission."

In a like manner, the simple question here presented for decision is as to each shipment, whether or not there is a published rate and whether or not the act obligates the appellees to transport under those rates. In a like manner, the inquiry in the case now presented to the court would, in all respects, be like that commonly made by the courts when called upon to construe and apply any other document.

In *Macon D. & R. Ry Co. v. General Reduction Co.*, 44 Fed. (2d) 499 (certiorari denied, 283 U. S. 821, there is a discussion of the issue here involved.

Pennsylvania Railroad Co. v. Puritan Coal Mining Co., 237 U. S. 121 showed the proper distinction that should be made in regard to cases in which the courts have jurisdiction and in which the jurisdiction rests solely with the Interstate Commerce Commission. At pages 131-132 the criterion is set forth:

> "But it must be borne in mind that *there are two forms of discrimination,—one in the rule and the other in the manner of its enforcements; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule.* In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the

> Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction, as provided in paragraph 9.
>
> "But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or federal courts." (Italics ours.)

Substantially similar to this case (Pennsylvania Railroad Co. v. Puritan Coal Co.) are *Illinois Central Ry. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275; *Pennsylvania Ry. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120; *Eastern Railway Co. of New Mexico v. Littlefield*, 237 U. S. 140. The distinction between the different authorities is found in this question: Was there an existing duty to be performed by the common carrier and a corresponding established right of the shipping public that could be shown by an existing published tariff, rule or regulation, or was it necessary in order to create such right of the shipping public that some note or rule be changed, modified or established? In the instant case, respondents ask only for the enforcement of the duty of the common carrier as shown by existing published tariffs, rules and regulations.

The duty upon connecting carriers to furnish equipment is joint. The Commission had before it this point in

Huerfano Coal Co. v. Colorado & Southeastern Ry., 28 I. C. C. 502 and stated (p. 506):

> "It is the view of the Commission that each carrier subject to the act is charged with the duty of furnishing cars to the industries located upon its line. *In the case of through routes composed of two or more carriers the obligation to furnish cars for transportation over such through routes is joint upon the carriers therein.* The law of this case, therefore, is that the Colorado & Southeastern Railroad, so long as it is to be considered as a common carrier, has the duty of furnishing cars for shipments between points on its line if there are any such shipments. Its obligation to furnish cars for shipments to points upon the lines of its connections is joint with such connections, and it cannot be relieved of its portion of such joint liability by any contract with such connections." (Italics ours.)

In *Campbell River Creek Coal Co. v. A. A. R. R. Co.*, 29 I. C. C. 682, 33 I. C. C. 558, it was contended that the railroad upon which the industry was located was obligated to furnish all the cars to the industry on its rails. Of this contention the Commission stated (p. 562):

> "Defendants argue that *its* (referring to the Campbell River R. R.) obligation is to furnish all cars needed, but this is not the requirement imposed by the act. While the responsibility to the shipper of furnishing a proper supply of cars rests upon the road upon which the shipper is located and the traffic originated, the originating line, as between it and its connections, does not necessarily rest under the burden of supplying all cars which may be required for transportation over through routes under joint rates." (Parentheses ours.)

Likewise, see *United Collieries v. Southern Railway Co.*, 96 I .C. C. 338.

The case of *Chicago, Rock Island & Pacific Railway Co. v. United States*, 284 U. S. 80 gives an excellent discussion of the car hire and interchange of equipment rules. With respect to the duties of the short lines to furnish cars it was said (p. 97):

> "Short lines, as well as trunk lines, participating in joint rates, must furnish their share of the equipment. *If they do not own cars, they must rent them.* The Commission itself has pointed out very clearly the basis for this requirement." (Italics ours.)

That case further found that the order of the Commission was in the scope of the statutory powers. At page 91 the court stated:

> "That the order of the Commission falls within the scope of its statutory powers is clear. Interstate Commerce Act, Section 1, subds. 10-14, as amended by Transportation Act, 1920, c. 91 Sec. 402, 41 Stat. 456, 476, U. S. C. title 49, Sec. 1, (10) to (14), 49 U. S. C. S. Sec. 1 (10-14) Subdivision (14) provides: 'The Commission may, after hearing on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this chapter, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for non-observance of such rules, regulations or practices."

Again on the same page, the Supreme Court stated:

> "Nor is it disputed *that under the law*, in the operation of through rates, *common carriers subject to the Interstate Commerce Act may be obli-*

gated to permit their car equipment to be carried beyond their own lines." (Italics ours.)

In *Atlantic Coast Lines v. Smith Bros.*, 63 Fed. (2d) 747 (certiorari denied, 289 U. S. 761), the court specifically stated that the rule of the Interstate Commerce Commission fixing joint responsibility for violations of the Act for through routes where there are only combination of local rates has the approval of the court (p. 748). The court there cited the following cases in which that rule of the Commission had been approved. *Louisville & Nashville Ry. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, *News-Syndicate Co. v. New York Central Railroad Co.*, 275 U. S. 187; *Lewis-Simas-Jones Co. v. Southern Pacific*, 283 U. S. 654 and *Kanawha Black Band Coal Co. v. Chesapeake & Ohio Railroad*, 197 W. Va., 469.

Petitioners should not and cannot be allowed to escape their obligation to furnish equipment by the subterfuge of the saying by one that we have no equipment and by the other that our lines do not touch this point. The duty is a joint one and remains and prevails regardless of whether any equipment is owned or whether there is direct service by the line of the carrier. It was specifically said in *Pennsylvania Railroad Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120 that the duty to furnish cars for the purpose of performing transportation is not qualified by the Interstate Commerce Act in any place except that

part of it dealing with the emergencies created by car shortages. The court stated:

> "It is only in times of car shortage resulting from unusual demand where other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carriers can be regarded as qualifying or affecting the right of the shippers to demand and receive cars, commensurate in number with their needs."

There is nothing in the record in this case to show that there is now or will be an emergency created by car shortage.

Thus it is seen that with the case presented in its essentials that not only does the district court have jurisdicition over the question and power to issue its writ of mandamus to protect respondents in their rights but that the district court is the only tribunal to which respondents can apply for relief.

The attention of the court is particularly directed to the last two paragraphs on page 13 of petitioners' brief, reading as follows:

> "In the present case, 'the inquiry is essentially one of fact and one of discretion in technical matters.' The right of respondents to a supply of cars for the movement of their traffic is by no means absolute. At best, they are members of the shipping public and have no greater right to the available supply than other shippers in like circumstances. The circumstances, including the supply of each kind of cars available and the necessities of other shippers, must always be determined in the light of conditions existing at the time the demand is made. The complexity of the factors which must be taken

into consideration in passing upon the reasonableness of a demand for cars was shown by the testimony of the witness Levy (infra, pp. 27-29).

"Consideration must be given, when each demand is made, to the number and type of cars demanded; the requirements of other shippers for like cars at different points of origin; the prior right of shippers of perishables; the length of time the equipment demanded will be engaged in the service for which the demand is made; the location of the points where it will be released, and perhaps to other matters, 'for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable'."

The points made in the argument quoted could be made in any case where a shipper was seeking to enforce the rights under the law to have made available to him cars for the transportation of his freight. We are dealing here with no question of the car shortage particularly in view of the fact that the traffic would move in the same cars but over a different route (through Corpus Christi, in order that the petitioner, St. L. B. & M. Ry. Co. could have a longer haul). We are dealing here with ordinary normal conditions and if the conditions made by the petitioners in the argument above quoted be tenable, then the statute authorizing mandamus in such cases as this means absolutely nothing.

REPLY TO PETITIONERS' POINT III

Petitioners next assert that a mandamus does not properly lie in this case. Their complaint in this section goes rather to the form which a mandamus might take or the evidence which might be presented upon a hear-

ing and is wide of the discussion as to whether or not there is jurisdiction in the federal district court to *hear* a petition for a writ of mandamus. They present testimony from Mr. T. H. Levy the trustee and general superintendent of transportation in charge of car supply as to the difficulty and importance of his position and concluded with the theory that because of the rapid changes necessary at times to supply cars to different portions of the country that no court could supervise such an action. Petitioners could use this same argument if the case was before the Interstate Commerce Commission because the Commission itself cannot act from minute to minute to make plans. Thus logically as to supervision there is no difference between a court and the Commission in directing this service.

At page 35 of petitioners brief it is stated:

> "Several cases may be found in which, under Section 49, the writ of mandamus has been issued to compel a carrier to supply cars."

With petitioners admitting that under the specific section which this suit is brought that writs of mandamus are isued to compel carriers to supply cars, we will not trespass upon the court's time in distinguishing and pointing out the inconsistencies in the state court cases cited to support their contention or distinguish the cases cited as being decided upon this point in the federal court. Respondents have no other remedy than mandamus in a situation of this sort. It would not be futile to issue the writ as petitioners could and would obey its terms. They are complaining of a nebulous and phantom situation—

an extreme car shortage and emergency and further of the terms of as yet non-existent writs of mandamus. Such questions are irrelevant to any discussion of the jurisdiction of the federal district court to hear and grant a writ of mandamus.

Title 49, Article 49, U. S. C. A. reads as follows:

> "**MANDAMUS TO OBTAIN EQUAL FACILITIES FOR SHIPPERS.** The district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisons of the preceeding chapter, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by the preceeding chapter." (March 2, 1889, c. 382, §10, 25 Stat. 862.)

We repeat that if the contentions of petitioner as expressed in Point 3 of their argument are well taken, then the above quoted statute authorizing mandamus in cases such as this means absolutely nothing and is wholly unenforcible.

THE CASES CITED IN DISSENTING OPINION IN THE CIRCUIT COURT OF APPEALS

The dissenting opinion in the Circuit Court of Appeals contains three cases which the dissenting opinion asserts are determinative "beyond question" on the points here involved. (See Record, p. 151.)

With all respect to the learned justice rendering such dissenting opinion, we point out to the Court the very clear difference between such cases and the case here under consideration. The case of *L. & N. R. Co. v. Corey*, 54 Fed. (2d) 8, was very clearly a case involving an emergency situation, wherein, because of a shortage of cars, it was necessary for reasonable rules to be made with reference to the proper distribution of cars. The opinion in the case (page 9) states, among other things, as follows:

> "Plaintiff's claim is unique in the sense that he does not claim that defendant has discriminated against him, * * * or that there was an unexplained failure to supply cars in confessedly normal times * * * . The period was clearly an abnormal one of

great car shortage. The railroads had been but recently returned from Federal control. On April 1, 1922, a strike was declared by Union coal miners east of the Mississippi and north of the Ohio River, and on July 1, 1922, the railway shop men declared a strike upon practically all railroads. These events cooperated vastly to increase the number of mines to be served by the defendant and to decrease the number of cars available for such service."

The opinion continues on page 10 in part as follows:

"The extent and nature of the emergency have been noticed judicially in Avent v. U. S., 266 U. S. 127, 45 S. Ct. 34, 69 L. Ed. 202, and by the Interstate Commerce Commission in Ayrshire Coal Company v. Southern Railway Company, 96 I. C. C. 167. * * *

It is unnecessary for us to here determine the precise scope of the common-law duty to provide adequate facilities, or whether the profession of a common carrier extends beyond that it will serve all who apply, without discrimination, to the maximum extent of its ability, in view of the equipment it has."

The opinion in the case above referred to shows very clearly that it is in no manner determinative of the points involved in the present case.

Another case cited in the dissenting opinion was the case of *Carrollton Excelsior & Fuel Company, Ltd. v. N. O. & N. E. R. Co.*, 69 Fed. (2d) 691. The opinion in this case, incidentally, was delivered by the same Honorable Judge who delivered the dissenting opinion in the present case. What this case actually involved is well shown

by the following excerpt from the opinion itself (see page 692):

> "The district judge thought the case involved primarily the investigation into and the determination of the reasonableness of rate and practices absolutely and in relation, interstate and intrastate. He thought it peculiarly one for the primary jurisdiction of the Commission. He sustained the exception and pleas to the jurisdiction.
>
> "We think he was right. Plaintiff's suit is not as Price's was, American Railway Express Company v. Price Bros. (C.C.A.) 54 Fed. (2d) 67. A suit to recover overcharges resulting from the wrong application of published rates. Its suit questions the reasonableness of the rates in themselves and in their relation to others."

The difference between the point involved in the Carrollton case and the points involved in this case are so apparent as to require no comment.

Another case cited in the dissenting opinion is *U. S. Nav. Co., Inc. v. Cunard S. S. Co., Ltd.*, (C. C. A.) 50 Fed. (2d) 83. The question involved in that suit was whether the United States Shipping Board or the Federal Courts had jurisdiction of the complaint made by plaintiff of contracts which he alleged were monopolistic and arrived at by duress and coercion. The Shipping Act (Title 46 U. S. C. A., Sec. 814) provided that agreements could be made but must be approved or disapproved by the U. S. Shipping Board. The distinction between that case and the instant case is obvious. The basis of

the Cunard case is summed up by the Court as follows (p. 88):

> "If, as we believe, the foregoing analysis of the charges in the amended bill is correct, the gravamen of the cause of action in the case at bar was *the unreasonableness of the agreed rates of carriage*, which, had land carriers been concerned, would have been a matter requiring primary resort to the Interstate Commerce Commission." (Italics ours.)

We agree, if the question involved in this suit was the unreasonableness of some rule, rate or regulation, the primary jurisdiction would be vested in the Interstate Commerce Commission, but such is not the question presented in this case.

The Court itself based its decision upon another point, saying that the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 22) prescribed that nothing contained therein should

> " 'In any way abridge or alter the remedies * * * existing at common law or by statute, but the provisions of this Act are in addition to such remedies.' The Shipping Act, on the other hand, contains no clause preserving general legal and equitable remedies, but provides ample remedies of its own." (p. 88.)

Again, the Court stated upon the same page:

> "It thus seems evident that Congress has set up a standard for the shipping business quite different from that applicable to trade agreements affecting business on land."

It is reiterated on page 90:

> "But the Interstate Commerce Act preserved legal and equitable remedies, whereas the Shipping Act

> contains no such reservations' and prior resort should be had to it (the Shipping Board) as to all matters within its jurisdiction." (Parenthetical matter ours.)

We have no quarrel with the court's construction of the Shipping Act but we do note that there was a dissenting opinion by Swann, Circuit Judge, in that case. It is apparent that there are differences in the provisions of the Shipping Act and the Interstate Commerce Act, and no decision upon the Shipping Act is reputable authority upon an action brought under the Interstate Commerce Act, particularly a section that is directly contra to the provisions of the Shipping Act.

CONCLUSION

This case verly clearly involves the question of whether carriers may operate in a certain territory, have on file with the Interstate Commerce Commission tariffs covering such operations, accept such freight as they chose from certain shippers and certain localities in the course of their operations, and refuse to furnish transportation service to other shippers or other localities, even though there are tariffs on file with the Interstate Commerce Commission applying to the furnishing of such transportation service.

The carriers in this case have refused and are refusing to do three things:

a. Handle the movement of cars under the tariffs in question even when the cars belong to other railroads and are tendered to them loaded for shipments.

b. Furnish to the shippers herein involved reasonable equipment for the transportation of their commodities.

c. Handle on a return trip from Mexico cars destined to the port of Brownsville although they will handle such cars from Mexico to any other point in the United States.

The case very clearly involves the question of whether carriers operating as above referred to may, through the refusal to furnish transportation service, practically destroy certain shippers or a certain port, and this in spite of the fact that great sums of money have been spent upon the construction of the facilities at the port.

Regardless of the different contentions advanced by petitioners two facts stand as practically admitted—*a*, the freight involved must and will move in some way and in substantially the same equipment regardless of how it moves. If it moves in a manner satisfactory to petitioners, they have no objection to furnishing the equipment and for that matter raise no objection even to permitting the equipment to go to Mexico.

b. The sole reason for the petitioners refusing to furnish transportation service to respondents is that they desire to force traffic to move via another route so that

out of the handling of such traffic they may receive greater revenue.

It is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed.

Respectfuly submitted,

A. B. COLE,
of Rentfro & Cole,
Brownsville, Texas,

A. L. REED,
CARL B. CALLAWAY,
of Callaway & Reed,
Dallas, Texas,
Attorneys for Respondents, Brownsville Navigation District of Cameron County,
F. A. Lallier, J. G. Philen, Jr.

Dated: February 17, 1938.
Address: CALLAWAY & REED,
1902 Santa Fe Building,
Dallas, Texas.

Copies of this brief have been furnished to and served upon the Honorable Robert H. Kelley, attorney for Guy A. Thompson, Trustee, and The St. Louis, Brownsville and Mexico Railway Company and the Honorable John P. Bullington, attorney for Port Isabel & Rio Grande Valley Railway Company.

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In the

Supreme Court of the United States

October Term, 1937

No. 300

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR—GUY A. THOMPSON, TRUSTEE, ET AL.,

Petitioners,

vs.

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL,

Respondents.

SUPPLEMENTAL BRIEF FOR RESPONDENTS

A. B. COLE,
Of Rentfro & Cole,
Brownsville, Texas,

A. L. REED,

CARL B. CALLAWAY,
Of Callaway & Reed,
Dallas, Texas,
Their Attorneys.

Dated: March 7, 1938

Address: CALLAWAY & REED,
1902 Santa Fe Bldg.,
Dallas, Texas.

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

PRELIMINARY STATEMENT

At the time this case was argued before this Court, different members of the court expressed an interest in the following propositions, and leave was granted respondents to file this supplemental brief bearing upon said propositions.

No lengthy discussion will be made of the propositions in question. Attention of the Court will be directed to the contentions of respondents, citation of applicable statutes and authorities will be given, and a brief argument made upon each point.

The propositions in question are as follows:

I. *The holding and opinion of the Interstate Commerce Commission in the cause pending before it, and the effect, if any, of that opinion upon the cause in this court.*

II. *Whether the position of the Port of Brownsville and the respondent shippers in this case is affected by the fact that the tariff upon which they rely is called by the carriers a "switching tariff."*

III. *Whether the position of the Port of Brownsville and the respondent shippers in this case is affected by the fact that the carriers involved have not published joint through rates.*

IV. *Whether the remedy of mandamus may be applied in any case except one involving discrimination.*

I.

The Holding and Opinion of the Interstate Commerce Commission in the Cause Pending Before It, and the Effect, If Any, of that Opinion Upon the Cause in This Court.

On the argument of this case, the Court expressed an interest in the opinion of the Interstate Commerce Commission in *Brownsville Navigation District of Cameron County, Texas, et al, v. St. Louis, Brownsville and Mexico Railway Co., et al*, 225 I.C.C. 246, which cause involved, before the Interstate Commerce Commission, the question of discrimination as between shippers and communities resulting from the carriers' acts other than

unequal enforcement of existing and published rules, rates and regulations. It also involved a question of discrimination resulting from the practices of carriers in permitting their equipment to go into the Republic of Mexico when transporting commodities through ports other than Brownsville but refusing to permit such equipment to move into Mexico when transporting commodities moving through the Port of Brownsville. In the latter named particular, there is some similarity between the issues before the Commission and the issues here but the Commission has held, following the decision of this Court in *United States v. Pennsylvania Railroad Co.*, 242 U. S. 208, that it is without jurisdiction to determine the matters involved in the proceeding presented to the Federal District Court. *C. S. Wells v. Chicago, Burlington & Quincy Rd. Co.*, 161 I.C.C. 145 and *In the Matter of Private Cars*, 50 I.C.C. 652-671. For the convenience of the Court, a copy of the opinion of the Interstate Commerce Commission in the Brownsville case is attached as an appendix to this brief. The attention of this Court is particularly directed to Paragraph 4 of the syllabus to the opinion and to the last paragraph on page 247 and the first two paragraphs on page 248 of the opinion.

The opinion of the Interstate Commerce Commission reserved for future consideration the questions here presented until this Court determined the question of juris-

diction. (Page 248, opinion of the Commission attached hereto.) The Commission stated:

> "Under the circumstances our finding at this time will be confined to the alleged violation of section 3."

The Commission, therefore, determined only Section 3 matters as between the shippers using the Port of Brownsville and those using the Port of Corpus Christi in the handling of traffic to and from the Republic of Mexico. The case before this Court involves the matter of the discriminatory enforcement of existing published tariffs for the transportation of commodities at published rates. The matter has not been passed upon by any tribunal and the only question here presented is the jurisdiction of the lower court to pass upon that question.

II.

Whether the Position of the Port of Brownsville and the Respondent Shippers in This Case is Affected by the Fact That the Tariff Upon Which They Rely is Called by the Carriers a "Switching Tariff."

The contention of the respondents in this case may briefly be summarized as follows:

1. Under tariffs of petitioner carriers on file with the Interstate Commerce Commission, respondents have the right to receive "transportation" service on shipments from the Port of Brownsville to the interchange between the St. Louis, Brownsville and Mexico Railway

Company and the Brownsville & Matamoros Bridge Company.

2. Such "transportation" under the applicable statutes and holdings of both the Interstate Commerce Commission and this Court includes both actually moving the traffic and furnishing necessary equipment for same.

3. The carriers herein have refused to (a) permit the loading of cars at the Port of Brownsville, regardless of the ownership of such cars, when they are destined to the interchange with the Brownsville and Matamoras Bridge Company, although the carriers will permit the loading of cars at the Port of Brownsville when such cars are destined to any other point in the United States; (b) move cars from the Port of Brownsville to the connection with the Brownsville and Matamoras Bridge Company, although said carriers will move cars from the Port of Brownsville to any other point in the United States; (c) move cars from the connection with the Brownsville and Matamoras Bridge Company to the Port of Brownsville regardless of the ownership of the cars and regardless of how they reach the connection with the Brownsville and Matamoras Bridge Company through Mexico, although the carriers will move such cars from the connection with the Brownsville and Matamoras Bridge Company if said cars have as their destination the Port of Corpus Christi, or any other point in the United States except the Port of Brownsville; and (d) furnish reasonable equipment for the "transportation" desired by the respondents, although the carriers will furnish such

equipment for "transportation" from the Port of Brownsville to any point in the United States other than the connection with the Brownsville and Matamoras Bridge Company.

4. No question of car shortage or of car distribution rules because an emergency is involved in this case.

5. The obligation of petitioner carriers is not changed because of the fact that the tariff of the St. Louis, Brownsville and Mexico Railway Company is called by the carrier a "switching tariff."

6. The obligation of petitioner carriers is not affected by the fact that joint through rates are not published.

7. Since the carriers refuse to perform the transportation services to which respondents are entitled, respondents have the right to invoke the remedy of mandamus as specifically authorized by Title 49, Section 49, U. S. C. A.

We believe that our original brief filed in this case shows beyond question that "transportation" to which a shipper is entitled includes the furnishing by the carrier of reasonable equipment and that joint responsibility rests upon the different carriers involved in a shipment to furnish such equipment regardless of the line upon which the traffic originates. Upon the argument before the Court, the point was raised by the petitioners that regardless of the duties of the carriers in an ordinary case of this kind, the instant case is to be distinguished because the St. Louis, Brownsville and Mexico tariff is

merely a "switching tariff." Different members of the Court evidenced an interest in this particular point.

There are several different answers to this contention.

The first answer is found in the Interstate Commerce Act itself. No distinction is set forth in the Act requiring or permitting a carrier to be under different obligations to different shippers depending upon whether the traffic of those shippers is handled under a line haul tariff or under a switching tariff. On the contrary, the Act specifically states as follows [U. S. Code, title 49, sec. 1(3)]:

> "The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also *all switches, spurs, tracks, terminals, and terminal facilities* of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this part shall include *locomotives, cars, and other vehicles*, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." (Emphasis ours.)

It would appear reasonable that if the petitioners are to rely upon the proposition that the duty of a carrier to furnish transportation (including equipment) is different under a switching tariff as distinguished from an ordinary tariff, then the burden should be upon the petitioners to support this contention, either by the provisions of the Interstate Commerce Act itself or by interpretations of that act by the Interstate Commerce Commission or this Court.

The next answer to this contention is found in the tariff. (R-94.)

Originally, transportation under this tariff was performed in connection with a line haul of the traffic. This was changed by the carriers themselves. L. S. Bourne, General Manager of the Port Isabel & Rio Grande Valley Railway, testified as follows:

> "Effective about June 1, 1936, by agreement between the Rio Grande, Missouri Pacific and Southern Pacific, the turning basin of the Port of Brownsville, as hereinabove prescribed, was placed in the switching limits of Brownsville, Texas. The purpose of including the turning basin in the switching limtis of Brownsville was to give to the Port of Brownsville the benefit of the freight rates available to and from Brownsville and the benefit of Brownsville switching rates." (R-126.)

Pursuant to this plan, The St. Louis, Brownsville & Mexico Railway Company filed the tariff above referred to by which they agreed to handle "all carload freight,

except as otherwise shown to or from points in Mexico" * * * BETWEEN * * * Interchange connections with other lines * * * AND * * * Interchange of the St. L. B. & M. Ry. with the Brownsville & Matamoros Bridge Company." (R-94.)

But The St. Louis, Brownsville & Mexico Railway Company went further than this. It assessed a different charge for the handling of traffic "upon which connecting lines have or will secure line haul" and "traffic originating or destined industry tracks of connecting lines within the switching limits of Brownsville, Texas." In this connection, attention of the Court is respectfully called to the fifth column of the tariff (R-94) headed "Switching Rates per Car" and the two different charges contained in that column of $3.15 and $3.50. It will be observed that note No. 8 applies to the item of $3.15 per car and that note No. 9 applies to the item of $3.50 per car.

Reading the tariff, it will be seen that the carriers agreed to charge $3.15 per car (see Note 8) "applicable only on traffic originating or destined points beyond Brownsville, Texas, upon which connecting lines have or will secure line haul" and that they demanded $3.50 per car (now see note 9) "applicable on traffic originating or destined industry tracks of connecting lines within the switching limits of Brownsville, Texas."

In other words, at the time the tariff was filed, the St. Louis, Brownsville and Mexico Railway Company de-

manded a greater charge for "transportation" in instances where no line haul was enjoyed by connecting lines than where the connecting carrier received a line haul.

It thus appears that the St. Louis, Brownsville and Mexico Railway Company had in mind the very situation involved in this case and by the provisions of the tariff voluntarily filed by it, the carrier held itself out to furnish transportation on shipments where no line haul was enjoyed by connecting lines, but in such instances a greater charge was to be exacted. This carrier now refuses to furnish the transportation covered by this particular tariff, even though the shipper is ready and willing to pay the greater charge for the service.

The next answer to the contention in question is found in the statutes and authorities quoted in our main brief and also the following.

The attention of the court is particularly directed to the case of *United States, ex rel Stony Fork Coal Co., et al (United States Intervener) v. Louisville & N. R. Co., et al, 195 Fed. Rep. 88:*

This case was not included or referred to in the original brief filed by us in this cause. The case when read in conjunction with the case of *Atlantic Coastline Railway Co. v. Smith Bros.*, 63 Fed. (2d) 747 (cited in our original brief) contains practically a complete discussion of all of the points raised by the petitioners in this cause. The full effect of the case cannot be understood except

by reading the entire opinion. The opinion in this case holds in accord with practically every contention of the respondents in the instant case.

To show how closely the case bears upon the point here immediately under discussion (namely whether or not the obligation of the carriers is affected by the so-called "switching tariff") we call attention of this Court to the following language contained in the above cited case at page 90:

> "The Louis & Nashville Railroad does not acknowledge any legal or moral obligation to furnish cars or transportation to the petitioners for the shipment of coal from the points above mentioned to Southeastern territory for the reason *that it only performs a switching service for the Southern Railway in transporting coal from said points of origin to Middlesborough*, and refuses to transport the coal of petitioners further than to Middleborough." (Italics ours.)

Mandamus was issued in that case regardless of the contentions made by the carriers, which are similar to the contentions made in the instant case.

The Interstate Commerce Commission in the case of *C. S. Wells & Sons v. Chicago, Burlington & Quincy Rd.*, 161 I. C. C. 145, held at page 149 that it was without jurisdiction to issue an order requiring the carriers to perform their transportation duties and obligations as defined by Section 1, Paragraph 4, of the Act. In that case, the defendant railroad had refused to deliver loaded cars on complainant's tracks which served its warehouse in Keokuk, Iowa, when such traffic was received from

connecting carriers reaching Keokuk. In other words, defendant C. B. & Q. railroad refused to switch the traffic to the warehouse of complainant because it had not obtained a line haul on that traffic into Keokuk. The loaded cars were tendered to the carrier for transportation under existing published tariffs. At page 148, the Commission stated:

> "It seems obvious that, in the absence of restricting tariff provisions, the publication of a charge for a given service carries with it an obligation to perform the service for which the charge is named. This seems to be conceded by the defendant; its defense is based upon other grounds."

After concluding that the carriers were violating their published tariff and refusing to transport in accordance with the requirements of Section 1, Paragraph 4, the Commission concluded at page 149:

> We further find that the defendant's tariff herein named requires it to perform the switching service requested by the complainants, and that the refusal of the defendant to perform such service in accordance with the said tariff is a violation of its tariff and of its duty under section 1, paragraph (4) of the act. *We conclude, however, that this commission is without jurisdiction to prescribe a remedy for either of said violations.*" (Italics ours.)

That decision was rendered Jan. 28, 1930. It followed an interpretation of Section 1, Paragraph 4, in the case of *United States v. Pennsylvania Railroad Co.*, 242 U. S. 208.

Also it followed a previous decision of the Commission interpreting the same section of the act. See *In the Matter of Private Cars*, 50 I. C. C. 652-671.

The case of *United States v. Pennsylvania Railroad, Supra*, involves a review of the opinion of the Interstate Commerce Commission in the case of *Pennsylvania Paraffine Works v. Pennsylvania Railroad Co.*, 34 I. C. C. 179. In that case the Commission had issued an order requiring the Pennsylvania railroad to furnish tank car equipment for the transportation of petroleum products. The review of the matter by the Court therefore was with reference to the power of the Commission to issue the order in question. The Court there gave consideration to Section 1, Paragraph 4, as in effect at that time. The opinion of the Commission was rendered May, 1915. The opinion of the Court in October, 1916. At that time, Section 1, Paragraph 4, provided as follows:

> "And it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; *and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.*" (36 Stat. L. 545, Sec. 7.)

In the present act the italicized portion has been omitted and other provisions reading as follows have been added:

> "and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers."

It will be seen that the provisions with respect to the duty to furnish transportation upon reasonable request therefore has not been materially changed. This is important because the duty to furnish transportation as construed by the Court in that case was made in the light of the term "transportation" as contained in Section 1, Paragraph 3, of the act, 36 Stat. L. 545, Section 7, in effect at that time. At that time the provisions of Section 1, Paragraph 3, provided as follows:

> "And the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

At the present time the amended paragraph 3 defines the term "transportation" as follows:

> "The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

It will therefore be seen that no material change has been made in the act insofar as that controversy was concerned.

Since the present act, with respect to the duty to transport, is substantially the same as the act that was before the Commission and the Court in the cases cited, necessarily the case of *United States vs. Pennsylvania Railroad Company, supra*, is a direct and positive authority holding that the court and not the Commission has jurisdiction of the matter here under consideration. The Court in that opinion considered Section 1, Paragraph 3, defining transportation, and Section 1, Paragraph 4, defining the duty to transport. The act, as in effect at the time the opinion was rendered, and the terms and provisions of the present act, have been heretofore quoted. It is significant that the court adopted and quoted with approval a former opinion of the Commission interpretating the same sections of the act.

The Court stated the question before it in the following language (242 U. S. 218-219):

> "In other words, the main question presented is, whatever be the duty of carriers as to the equipment they must have or furnish, whether the Interstate Commerce Commission is the tribunal to enforce the duty."

At 242 U. S. 221 the Court, quoting from a former opinion of the Commission, stated:

> "The statute does not undertake to clothe Interstate Commerce Commission with the power by summary proceeding of compelling a railroad company to perform all its common-law duties, but leaves many of these to be enforced in the courts by suits for damages and by other proceedings."

The final conclusion of the Court, with respect to the matter, is found at 242 U. S. 226-227, there the Court stated:

> "But other words occur which, it is contended, have such effect. These words are: 'And it shall be the duty of every carrier * * * to provide and furnish such transportation upon reasonable request therefor * * *.'
>
> This, however, is but the expression of a necessary implication. It was useless to declare that whatever a carrier must do, he must do 'upon reasonable request.' The duty having been imposed, it necessarily could be demanded. But the expression of the right, if it needed expression, adds nothing of indication to the previous words of the tribunal by which the demand was to be enforced.
>
> But it is said the duty having explicit declaration, the power to enforce it was found in Sec. 12 as amended March 2, 1899, as follows: 'And the Commission is hereby authorized and required to execute

and enforce the provisions of this act.' (25 Stat. at L. 855, 858, chap. 382, Comp. Stat. 1913, Sections 8569, 8576.

"But this casts us back to our general considerations, to which we may only add that there was no question of the duty of carriers either under the Act of 1887 or under the amendment of 1906. It was their duty under both to furnish the instrumentalities of transportation. The question is whether, under the latter, as under the former, jurisdiction to enforce the duty was at common law in the courts, or under the statute and in the Commission and we have seen that it was the view of the Commission that the remedy was in the courts, *and that the amendment of 1906 was not intended to and did not change the remedy.* In other words, that Congress in effect accepted the explanation of the Commission and approved its decisions. We repeat, the amendment of 1906 was drawn by and recommended by the Commission, and it may be assumed was not intended to have nor given larger import in the law than it had in the recommendation." (Italics ours.)

It is clear that the jurisdiction to issue orders commanding the carriers to perform their transportation duties, as created by the common law and as defined by the statute, resides alone in the Courts.

III.

Whether the Position of the Port of Brownsville and the Respondent Shippers in This Case is Affected by the Fact That the Carriers Involved Have Not Published a Joint Through Rate.

The Circuit Court of Appeals, in its opinion in this case, stated as follows:

"It is true that the carriers in this case have pub-

lished no joint through rate, but it is admitted that they are connecting carriers, that the commerce which appellants seeks to have transported over appellees' joint lines is a through movement between the port of Brownsville and the interchange with the National Railways of Mexico; and that both of the appellees have promulgated and filed with the Commission tariffs naming per car charges for such through transportation. Therefore, there is a through route composing of the two lines of railway, there is a through rate composed of two separately published tariff factors; and there is joint responsibility for the through transportation. Atlantic Coastline Railway Co. v. Smith Bros., 53 Fed. (2) 747, certiorari denied, 289 U. S. 761, 53 Sup. Ct. 795.

"The law specifically defines through rates, and adds (Sec 6, par. 1): 'If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation.' Referring specifically to this section, in Kansas City Southern Ry. Co. v. Albers Commission Co., 223 U. S. 573, 32 Sup. Ct. 316, the court said: 'In every substantial sense, local rates and joint through rates were placed on the same level.' In United States v. Illinois Central R. R. Co., 263 U. S. 515, the court pointed out that the distinction between a joint and combination rate is without legal significance, and said: 'A through route was established; and the transportation is performed as a result of this arrangement, express or implied.'

"The Interstate Commerce Act does not require a joint through rate on each route, but 'where no joint rate is specified, the tariffs for the through routes commonly provide that the through rate shall be the sum of the local rates of the several connect-

> ing carriers contributing to the movement.' Brown Lumber Co. v. L. & N. R. Co. (Jan. 4, 1937), 299 U. S. 393. In this recent case, the court, upon the authority of Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285, upheld the carrier's construction of its published rule, notwithstanding the Commission, by reparation order, had sustained the shipper's claim. If the law is what the courts do, even more than what they say, this is an authority in two aspects for the doctrine that the construction and enforcement of non-technical, unambiguous railroad tariffs present a question of law for judicial determination." (R. 145-146.)

This particular point is fully discussed in the original brief filed by us in this court at pages 13-16.

However, what may or may not be the obligation of the petitioners to the respondents (with reference to the furnishing of the transportation here involved) because of the fact that no joint through rate was published, is of no importance in so far as the issue now before this Court is concerned. The sole question before you is the question of the jurisdiction of the trial court to hear the complaint of the respondents, regardless of any defenses the carriers might have. The obligation of the carriers to the respondents arises out of the provisions of the Interstate Commerce Act. What they may or may not be required to do in this case is a matter of law. It is in no manner a matter requiring an administrative finding. The determination of no question of fact is involved. There is no disagreement between the parties with reference to the facts. There is no question with reference to the actual tariffs which apply to the shipments involved.

The parties are in agreement with reference to all facts, including the identifying of the tariffs involved.

If there is a valid defense available to the carriers in this case based upon their claim that they have no obligation to furnish cars because no joint through rate has been established, then that defense may and should be presented to the court hearing the case. The soundness or the unsoundness of this contention of the carriers will be determined by that court *as a matter of law* under judicial interpretation of the provisions of the Interstate Commerce Act.

IV.

Whether the Remedy of Mandamus May Be Applied in Any Case Except One Involving Discrimination.

It is not necessary in this case to discuss the question of whether mandamus will properly apply in the absence of discrimination against a complainant in the enforcement of tariffs or rules and regulations of a carrier, for the reason that under the undisputed facts the following discriminatory practices are shown: (Testimony of Witness Hofmokel, R. 102-114; Witness Lallier, R. 130-133; Witness Philen, R. 134-137.)

1. The carriers refuse to furnish to the Port of Brownsville and shippers at the Port of Brownsville under lawfully published tariffs the same character of service they furnish other shippers (at Corpus Christi, Texas) under similar tariffs.

2. The carriers will transport the goods of shippers from the Port of Brownsville to any other point in the

United States other than the point of interchange with the Brownsville & Matamoros Bridge Company, but they will not perform the same service for shipments of the respondents from the Port of Brownsville to such point of interchange.

3. The carriers herein involved will furnish transportation from said interchange point with the Brownsville & Matamoros Bridge Company *through Brownsville* to Corpus Christi. They will not perform the same service through Brownsville to the Port of Brownsville. This is true regardless of where the traffic originates in Mexico, who brings it to the interchange point, and who owns the cars in which it is being moved. In other words, the St. Louis, Brownsville and Mexico Railway Company will not even perform a switching service from the interchange with the Brownsville & Matamoros Bridge Company to the interchange with the Port Isabel & Rio Grande Valley Railway on cars destined to the Port of Brownsville.

4. The Missouri Pacific will switch and does switch cars furnished by The Texas Mexican Railway Company at Corpus Christi between the Port of Corpus Christi and the interchange with The Texas Mexican Railway Company while at the same time it refuses to switch cars furnished by Port Isabel & Rio Grande Valley Railway between the Port of Brownsville and the interchange with the Brownsville & Matamoros Bridge Company.

The carriers will not even permit the loading at the Port of Brownsville of cars (regardless of the ownership of such cars) with goods destined to the interchange with the Brownsville & Matamoros Bridge Company. They will permit the loading of and transport cars loaded at the Port of Brownsville for destination to any other points in the United States. . . .

By "discrimination" as herein used, we refer to that character of discrimination discussed by this court in the case of *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U. S. 121, wherein this court stated (page 131-132):

> "But it must be borne in mind that there are two forms of discrimination, one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfairly discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say where such a rule unjustly discriminates against one class of shippers in favor of another * * *"
>
> "But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. * * *"

It is respectfully submitted that the decision of the Circuit Court in this cause should be affirmed.

Respectfully submitted,

A. B. COLE,
Of Rentfro & &Cole,
Brownsville, Texas,

A. L. REED,
CARL B. CALLAWAY,
Of Callaway & Reed,
Dallas, Texas,

Attorneys for Respondents, Brownsville Navigation District of Cameron County, Texas,

F. A. Lallier,
J. G. Philen, Jr.

Copies of this brief have been furnished to and served upon Honorable Robert H. Kelley, attorney for Guy A. Thompson, Trustee, and St. Louis, Brownsville and Mexico Railway Company and Honorable John P. Bullington, attorney for Port Isabel & Rio Grande Valley Railway Company.

CARL B. CALLAWAY.

22034

INTERSTATE COMMERCE COMMISSION

No. 27691

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEX., ET AL. v. ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY ET AL.

No. 27691

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEX., ET AL. v. ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY ET AL.

Submitted July 1, 1937. Decided November 2, 1937

1. Refusal of the St. Louis, Brownsville & Mexico Railway Company to furnish cars for the transportation of freight between the port of Brownsville, Tex., and points in Mexico as to which traffic it is an intermediate switching carrier, while contemporaneously furnishing cars for the transportation of freight between other ports and points in Mexico, as to which this carrier participates in line-haul movement, found not unduly prejudicial.
2. Allegation that the failure of the Mexican lines to furnish American-owned cars in their control for the transportation of freight from Mexico to the port of Brownsville, while contemporaneously furnishing such cars for the transportation of freight to other ports in the United States, is due to instructions from the St. Louis, Brownsville & Mexico Railway Company and results in undue prejudice by that line, not sustained.
3. Refusal of the St. Louis, Brownsville & Mexico Railway Company to switch at Brownsville, Tex., cars furnished by other lines for the transportation of freight from the port of Brownsville to destinations in Mexico, while contemporaneously switching from the port of Corpus Christi, Tex., to the Texas Mexican Railway Company line at Corpus Christi freight destined to points in Mexico in cars furnished by the latter line for movement by it to Laredo, Tex., and the National Railways of Mexico beyond found unduly prejudicial to the port of Brownsville and unduly preferential of the port of Corpus Christi. Order requiring removal of this undue prejudice and preference entered.
4. No finding made respecting the allegation that the refusal of the defendants to furnish cars and transportation between the port of Brownsville and Matamoros, Mexico, results in violations of sections 1 and 6, as the question of jurisdiction under these sections is now pending before the Supreme Court of the United States.

A. L. Reed for complainants.

H. H. Larimore, *T. R. Ware*, *Geo. W. Holmes*, and *J. H. Tallichet* for defendants.

REPORT OF THE COMMISSION

MILLER, *Chairman:*

The complainants are the Brownsville Navigation District of Cameron County, Tex., operating port facilities at the port of Brownsville, which is in the vicinity of Brownsville, Tex., and F. A. Lallier and J. G. Philen, Jr., forwarding agents. By complaint

filed March 30, 1937, they allege that the defendants, Port Isabel & Rio Grande Valley Railway and the St. Louis, Brownsville and Mexico Railway Company (Guy A. Thompson, trustee), hereinafter called the Port Isabel Railway and Brownsville Railway respectively, due principally to their failure to furnish equipment, refuse to permit traffic to move between the port of Brownsville and Matamoros, Tamaulipas, Mexico, in violation of sections 1 and 6 of the act; also that the refusal of the Brownsville Railway to permit equipment to be used for the transportation of freight between Mexico and the port of Brownsville while permitting the use of equipment for the transportation of freight between Mexico and ports other than the port of Brownsville, principally Corpus Christi, Tex., is unduly prejudicial to the port of Brownsville and unduly preferential of other ports, principally Corpus Christi, in violation of section 3 of the act. The prayer is for an order requiring defendants to furnish equipment for, and the transportation of, freight between the port of Brownsville and Matamoros and requiring removal of the alleged undue prejudice and preference.

The traffic concerned is that originating in the United States and foreign countries, arriving at Texas ports by water, destined to points in Mexico, and traffic originating in Mexico destined to these ports for movement beyond by water, interchanged with the National Railways of Mexico at the international gateways of Matamoros or Nuevo Laredo, Mexico. Complainants, realizing that our jurisdiction is confined to transportation in the United States, do not seek an order requiring the movement of defendants' equipment into or out of Mexico. The only order sought with respect to the latter movement is under section 3, which, of course, would be in the alternative.

Prior to the filing of the complaint, complainants instituted a mandamus proceeding in the District Court of the United States for the Southern District of Texas, asking for the same relief as that here sought under sections 1 and 6 of the act. On March 16, 1937, that court held that it was without jurisdiction to determine the matter and that it was one of an administrative nature to be determined by us. Complainants appealed from the district court to the United States Circuit Court of Appeals for the Fifth District, which, on July 15, 1937, after submission of the instant proceeding, reversed the holding of the district court and remanded the case for further proceedings. *Brownsville Navigation District* v. *St. Louis, B. & M. Ry. Co.*, 91 F. (2d) 502. In arriving at its decision the Circuit Court of Appeals said:

> The district court has jurisdiction to grant the petition for mandamus, and the fact, if it be a fact, that the petition discloses unreasonable and prejudicial

discrimination by any carrier against the Port of Brownsville is not sufficient to defeat jurisdiction to issue the writ. Such discriminational practice may be a proper subject for investigation and determination by the Commission under the amendment of August 12, 1935 (49 Stat. 607, C. 509), but no such administrative relief is sought in this cumulative proceeding which is solely for judicial relief by writ of mandamus for the alleged failure of the carriers to perform their transportation duties to furnish cars in accordance with the published tariffs, and to desist from an unfair and discriminational enforcement of fair and reasonable published tariffs, regulations, and transportation agreements with respect to car service. The case should be heard and decided on the merits, notwithstanding any cumulative remedies of a judicial or administrative nature which may be available to appellants.

The defendants in the instant proceeding, appellees in the circuit court proceeding, filed petition with the Supreme Court of the United States for writ of certiorari and on October 11, 1937, the court granted the writ and the case is now pending before that court. Following the defendants' petition to the Supreme Court the complainants filed a petition here in which they ask us to defer action on their complaint, insofar as the alleged violations of sections 1 and 6 are concerned, until the Supreme Court decides the question of jurisdiction respecting the alleged violations last referred to. Under the circumstances our finding at this time will be confined to the alleged violation of section 3.

While other ports are alleged to be preferred, the evidence offered relating to the alleged violation of section 3 was confined almost entirely to that respecting the furnishing of equipment for, and transportation of, freight between points in northern Mexico and the port of Corpus Christi through Laredo, Tex., which is on the international boundary line adjoining Nuevo Laredo, and the failure to furnish equipment for transportation between points in northern Mexico and the port of Brownsville through Brownsville, which is separated from Matamoros by a bridge across the Rio Grande.

The Port Isabel Railway does not reach the alleged preferred ports or participate in transportation to or from such ports and the alleged violation of section 3 is directed solely against the Brownsville Railway, the only other defendant.

One of the principal points in northern Mexico from and to which traffic moves through the Texas ports, and which is representative of other points in that territory, is Monterrey, which is on one of the lines of the National Railways of Mexico, 217 miles from Brownsville and 167 miles from Laredo, both of which, as above stated, are on the international boundary line.

The port of Brownsville, which is similar to other ports in the State of Texas, is about 160 miles south of Corpus Christi, with which it competes for traffic, including that destined to or originating in northern Mexico. The port of Brownsville was constructed by

the people of Brownsville in cooperation with the United States Government at a cost of approximately $6,000,000, over $2,000,000 of which was assumed by the people of Brownsville. Establishment of this port was accomplished by construction of a ship channel approximately 17 miles inland from the Gulf of Mexico to within about 5 miles of the city limits of Brownsville. This channel is 26 feet deep and will accommodate the type of sea-going vessels that call at Gulf ports, with the exception of some very heavy-draft vessels that engage in this service. However, the Navigation District has had approved by the United States Government authority to deepen the channel to 28 feet for the purpose of accommodating all sizes and types of vessels customarily calling at Gulf ports. Facilities offered by the port of Brownsville, where there is a turning basin, consist of two warehouses, each 400 by 120 feet, a concrete apron 25 feet on the wharf, and an apron 10 feet in the rear of the warehouses. In addition there is an open wharf 400 feet in length, all concrete, which is double tracked. In general the facilities are adequate for interchange of traffic between steamship lines and railroad companies. They are the customary character of facilities afforded at ports in general. The Navigation District obtains its revenue from the traffic moving through the port. This revenue is used for the purpose of maintaining and operating the port and, in addition, for the purpose of retiring bonds which were sold to the Government. This port, which was opened May 16, 1936, was constructed with the idea that it would draw to itself not only a considerable tonnage originating in or destined to the Rio Grande Valley in Texas, but on the assumption that it would be a natural gateway for traffic moving to and from the northern part of Mexico. An investigation by the port authorities prior to the opening of the port showed a possible tonnage of 192,600 tons which would move through this port to Mexico and 160,500 tons in the reverse direction. Complainants estimate that the tonnage inbound to Mexico would require about 6,400 cars and the outbound tonnage about 5,300 cars annually. The actual tonnage which moved through the port of Brownsville to and from Mexico up to the time of hearing, April 30, 1937, was 16,417 tons, and to and from points in the Rio Grande Valley in Texas it was 44,715 tons. The latter traffic is not involved in this proceeding.

The only rail line serving the port of Brownsville is the Port Isabel Railway, and the only route over which shipments from that port destined to points in Mexico can move is over the line of the Port Isabel Railway to its connection in the city of Brownsville with the Brownsville Railway, 7.2 miles, thence over the line of the Brownsville Railway across the international bridge to Matamoros, 3.67 miles, where it is turned over to the National Railways of Mexico.

Traffic originating in Mexico would move from Matamoros to the port of Brownsville in reverse order. The established charge for transportation of freight between the port of Brownsville and the international bridge is $11.25 per car, regardless of weight, made up of a switching charge of $8.10 of the Port Isabel Railway for the movement between the port and its connection with the Brownsville Railway in the city of Brownsville, and a switching charge of $3.15 of the Brownsville Railway for the movement between this junction and the international bridge. The propriety of these charges is not questioned by complainants, nor is there any showing that any different charges have been or are being demanded or collected. Charges for transportation between the international bridge and the yards of the National Railways of Mexico at Matamoros, which is over the tracks of the National Railways of Mexico, are published by the Brownsville & Matamoros Bridge Company, but for operating convenience the Brownsville Railway takes the cars across the bridge to the yards of the National Railways of Mexico at Matamoros, and also picks up cars at that place when destined to points in the United States.

It should here be stated that it is the custom in this country for the carriers enjoying the line haul on traffic originating on a switching line to furnish the switching line with equipment for such transportation. Such equipment is furnished the Port Isabel Railway by the line-haul carriers for movements from the port of Brownsville of traffic destined to points in the United States. The Mexican railways, which have the line haul on traffic moving between the port of Brownsville and points in the interior of Mexico, do not permit their equipment, loaded or empty, to enter the United States. If, therefore, traffic is to move by rail between the port of Brownsville and the interior of Mexico without transfer of lading, it will have to be in equipment other than that of the Mexican carriers.

The only equipment owned by the Port Isabel Railway consists of an engine, caboose, and passenger car. Up to November 1936 shipments moved from the port of Brownsville to Mexico through Matamoros in equipment furnished by the Brownsville Railway. Since that time, when the Brownsville Railway was requested to furnish several hundred cars for the transportation of coke from the port of Brownsville to Monterrey, it has refused to furnish any equipment for the movement of traffic from the port of Brownsville to the interior of Mexico or to switch traffic destined to Mexico from this port in American cars which other lines offer to furnish for this transportation.

Of the Mexican tonnage above referred to which moved after November 1936, 183 carloads were trucked to or from Matamoros,

where they were delivered to or received from the National Railways of Mexico. Shippers object to the transfer of lading at Matamoros because of the unskilled labor there used and the additional cost factor. Shippers also desire to have their shipments move under customs seal. They state that unless they can obtain through transportation without transfer of lading they will not ship through the port of Brownsville.

The port of Brownsville, due to its proximity to the international boundary line, is a natural port for traffic moving to and from Monterrey and other points in northern Mexico and from the shippers' standpoint a very desirable one for the following reasons. The water rates from and to the Texas ports are, generally speaking, equalized, as are the rates in Mexico from and to Brownsville and Laredo, the two nearest international gateways. While from the port of Brownsville the only cost to shippers for transportation in the United States is the switching charge above referred to, from and to other ports there are charges for line-haul service in addition to switching charges. For example, on iron and steel billets, which are commodities moving to Monterrey, the carload charges, based on a minimum of 40,000 pounds, from Corpus Christi to Laredo, are $102.20, while from the port of Brownsville to Matamoros they are $11.15, or $89.95 less.

The port of Corpus Christi is served through trackage arrangements or over their own tracks by the Southern Pacific Company, the Texas Mexican Railway Company, the San Antonio, Uvalde & Gulf Railroad Company, and the Brownsville Railway. The two carriers last named are parts of the Missouri Pacific system. Under an operating arrangement the lines reaching the port of Corpus Christi agree to alternate for a period of one year each in performing the switching service from and to that port for each other. The Texas Mexican Railway has waived its right to perform this service. Between the port of Corpus Christi and Monterrey, which is one of the largest if not the largest importer and exporter of traffic through the Texas ports, shipments move through Laredo and Nuevo Laredo. The movement of this traffic for that part of the haul between Corpus Christi and Laredo is over the line of the Texas Mexican Railway, 160 miles, or over the lines of the San Antonio, Uvalde & Gulf and the International–Great Northern Railroad Company, the latter line also being part of the Missouri Pacific system, 263 miles. As before stated, the distance between Laredo and Monterrey is 167 miles, making the distances between Corpus Christi and Monterrey over the above routes 327 miles and 430 miles respectively. Traffic between the port of Corpus Christi and Monterrey also moves through Brownsville and Matamoros, the movement between Corpus Christi and Brownsville

being over the Brownsville Railway, 157 miles, or over the Southern Pacific, 251 miles. The distance between Brownsville and Monterrey, as above shown, is 217 miles, making the distances over the above routes through Brownsville between Corpus Christi and Monterrey 374 miles and 460 miles respectively.

Complainants contend that the Brownsville Railway and other parts of the Missouri Pacific system have been and are now pursuing a deliberate and designed policy of undue prejudice to the port of Brownsville for the specific purpose of diverting traffic to the port of Corpus Christi or other ports reached by them. In support of this, complainants show that, while at the port of Brownsville the Brownsville Railway refuses to furnish cars for the loading of freight destined to Mexico or to switch cars offered by other lines for this traffic, including refusal to switch shipments in cars made empty and reloaded at this port, the Missouri Pacific lines during the periods they perform switching service at Corpus Christi switch empty cars owned by them or by other American lines from their connection with the Texas Mexican Railway and, after loading at the Corpus Christi docks, return them to the Texas Mexican Railway, which transports the shipments in connection with the National Railways of Mexico through Laredo to Monterrey. The switching charge at Corpus Christi is the same as that at Brownsville, $3.15. Complainants show that a number of cars which moved over the latter route contained freight originally intended for movement through the port of Brownsville, which because of the refusal of the Brownsville Railway to furnish cars or switch cars which the Southern Pacific offered for the service were diverted to the port of Corpus Christi.

The Brownsville Railway denies that the Missouri Pacific lines furnish cars at Corpus Christi to other lines for transportation to Mexico. It seeks to justify its refusal to switch any American-owned cars loaded at the port of Brownsville destined to Mexico, on the ground that such movement would be in violation of the car-service rules,[1] which require that cars made empty on lines other than those which own them should move loaded or empty in the direction of the owner road. The Brownsville Railway urges that the cars referred to by complainants switched by the Missouri Pacific lines at Corpus Christi to the Texas Mexican Railway, and which moved over the latter line to Laredo and thence over the National Railways of Mexico to Monterrey, were cars furnished by the Texas Mexican Railway, which cars were in the possession and account of that line, for which the Missouri Pacific lines performed the switching service as agent.

[1] Code of Car Service Rules of the Association of American Railroads.

It urges that while certain of these cars were owned by the Missouri Pacific lines, cars tendered for switching are not interchanged; and also that, while the cars switched by the Missouri Pacific lines to the Texas Mexican Railway included some owned by lines east of the Mississippi River, and the car-service rules require that cars made empty on foreign lines be moved loaded or empty in the direction of the owner road, the Missouri Pacific lines are in no sense responsible for the action of the Texas Mexican Railway in transporting these cars to Laredo for movement to Monterrey.

The Brownsville Railway states that its refusal to furnish equipment for transportation from the port of Brownsville to points in the interior of Mexico is not for the purpose of diverting traffic to other ports, but is because, as an intermediate switching line, it is under no obligation to do so. It also urges that to furnish cars for transportation from the port of Brownsville to destinations in the interior of Mexico, as to which its revenue would be only $3.15 for intermediate switching, would be in a practical sense a gratuity to the port of Brownsville. As heretofore indicated, on traffic moving from the port of Corpus Christi to Mexico through Brownsville or Laredo the Missouri Pacific lines could have a line haul to these gateways. The shipments referred to by complainants which were loaded at the port of Brownsville and which the Brownsville Railway refused to switch to Matamoros were in cars owned by the Pennsylvania Railroad Company which had been delivered by the Brownsville Railway to the Port Isabel Railway for unloading at that port. As heretofore stated the Brownsville Railway bases its refusal to switch freight, loaded at the port of Brownsville and destined to Mexico, in cars furnished by any other American lines, on the ground that the movement to Mexico would not be in the direction of the owner road and therefore would contravene the car-service rules above referred to. In other words, the Brownsville Railway takes the position that, as an intermediate switching carrier at Brownsville, it is its duty to see that the car-service rules as construed by it are observed, and accordingly it refuses to switch American-owned cars, including those furnished by other lines, loaded at the port of Brownsville and destined to Mexico, while as an originating switching line between the docks at the port of Corpus Christi and its connection with the Texas Mexican Railway at Corpus Christi, with respect to cars furnished by the latter line for loading at the docks, no duty rests upon it to see that such cars when loaded move in the direction of the owner road in accordance with the car-service rules. This position is untenable.

The Brownsville Railway takes the further position that performance of the switching service at Corpus Christi above described,

while refusing to perform switching service at Brownsville, is justified and does not result in undue preference or prejudice because at Corpus Christi it is serving an industry reached by it, while this is not true at Brownsville, where it performs only an intermediate switching service. As stated in *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I. C. C. 151, 172:

> We often have found that a carrier may be guilty of prejudice to or preference of a point which it does not reach by its own rails and this doctrine has been upheld by the courts.

The Brownsville Railway, during the time it performs switching service at Corpus Christi, is a necessary link in the transportation of shipments moving between that port and points in Mexico. It is likewise a necessary link in transportation between the port of Brownsville and Mexico.

The situation with respect to the refusal of the Brownsville Railway to furnish its own cars for transportation from the port of Brownsville to Mexico, while furnishing its cars for transportation from the port of Corpus Christi for the same service, differs materially at the two ports in that the cars furnished at Corpus Christi are for line-haul transportation over the Brownsville Railway or other Missouri Pacific lines, while with respect to shipments moving from the port of Brownsville the Brownsville Railway is only an intermediate switching line. The furnishing of cars by the Brownsville Railway at Corpus Christi for movement over its line, while refusing to furnish cars at the port of Brownsville as to which it does not get a line haul, cannot be said to result in undue preference or prejudice.

Complainants also show that shipments originating at Laredo move to Mexico in Missouri Pacific lines' equipment. Those referred to, that moved from Laredo, were cars furnished by the Texas Mexican Railway and were in the possession and control of that carrier. Complainants further show that the Brownsville Railway furnishes its cars for the transportation of freight moving from Brownsville to points in Mexico. These cars are furnished by the Brownsville Railway at Brownsville for movement of shipments originating at that place on its line. This carrier states that, while as a switching carrier it is under no legal obligation to furnish equipment for this transportation, it feels that it is under some obligation to furnish such cars for shipments originating on its line. There is no allegation that the port of Brownsville is in competition with Brownsville or Laredo in shipping to or from Mexico. The traffic concerned is that moving through the Texas ports to and from Mexico.

With respect to shipments moving from Mexico, complainants allege that the Brownsville Railway has instructed the Mexican lines not to furnish Missouri Pacific lines' or other American-owned equipment for loading and movement of freight to the port of Brownsville, in consequence of which such cars made empty in Mexico moved loaded through Laredo to Corpus Christi and other ports, instead of through Matamoros to the port of Brownsville. While the Missouri Pacific lines admittedly object to, and discourage the use of, their equipment made empty in Mexico for shipments as to which they do not enjoy a line haul from Laredo or Brownsville, it is denied that the alleged instructions have been given. Furthermore, it is pointed out that cars moving to Mexico are interchanged with the National Railways of Mexico, which are parties to the American car-service rules, and that the Missouri Pacific lines are in no position to dictate to the Mexican lines as to how equipment made empty in Mexico shall be used. The movement of most of the equipment of the Missouri Pacific lines to Mexico is through Laredo, and under the car-service rules it should move back to the United States through that gateway. Complainants also show that the Brownsville Railway has furnished its equipment at Matamoros to the Mexican lines for the loading of shipments destined to Corpus Christi through Brownsville, while it refuses to furnish its equipment for the movement of freight from Mexico to the port of Brownsville. The Brownsville Railway seeks to justify this on the ground that, as to shipments moving to the port of Corpus Christi, it enjoys a line haul and line-haul revenue, while on shipments moving from Mexico to the port of Brownsville it would be only an intermediate switching carrier. Complainants also show that the Brownsville Railway furnished several empty cars, switched them from Brownsville to Matamoros for loading in Mexico, and switched such cars, when loaded, back to Brownsville, from which point they subsequently moved over the line of the Southern Pacific to Galveston and Houston. The Brownsville Railway has its own line from Brownsville to the ports referred to. It states that it is not its policy or practice to furnish equipment for the use of the Southern Pacific from Mexico to Galveston and Houston, and that the cars referred to probably were consigned originally to an industry on the Brownsville Railway at Brownsville and subsequently were diverted to these ports.

We find that the refusal of the Brownsville Railway to furnish cars for the transportation of freight between the port of Brownsville and points in Mexico, while contemporaneously furnishing cars for transportation of freight between other ports in the United States and Mexico as to which it participates in the line-haul movement, is not unduly prejudicial or preferential. We further find that the failure of the Mexican lines to furnish American-owned equipment

for transportation from points in Mexico to the port of Brownsville does not result in any undue prejudice or preference by the Brownsville Railway. We further find that the refusal of the Brownsville Railway to switch at Brownsville cars furnished by other lines for the transportation of freight from the port of Brownsville to destinations in Mexico, while contemporaneously switching from the port of Corpus Christi to the Texas Mexican Railway at Corpus Christi freight destined to points in Mexico, in cars furnished by the latter line for movement by it to Laredo, and the National Railways of Mexico beyond, is unduly prejudicial to the port of Brownsville and unduly preferential of the port of Corpus Christi.

An order requiring removal of the undue prejudice and undue preference will be entered.

COMMISSIONERS AITCHISON and ROGERS did not participate in the disposition of this proceeding.

225 I. C. C.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

No. 300.—October Term, 1937.

The St. Louis, Brownsville and Mexico Railway Company, et al., Petitioners, *vs.* Brownsville Navigation District of Cameron County, Texas, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 16, 1938.]

Mr. Justice Butler delivered the opinion of the Court.

Respondents applied to the United States court for the southern district of Texas to obtain a writ of mandamus[1] commanding petitioners to transport certain traffic and to furnish and continue for all time to furnish cars for transportation of freight between the Port of Brownsville, Texas, and Matamoros, Mexico. Petitioners by pleas to the jurisdiction asserted that the questions raised were essentially administrative and that therefore resort must first be had to the Interstate Commerce Commission. The district court heard evidence on the issues tendered by the pleas, sustained the petitioners' contention and dismissed the case. The cir-

[1] As defining jurisdiction, respondents rely on Judicial Code, § 24(8), 28 U. S. C. § 41: "The district courts shall have original jurisdiction . . . : . . . (8) Of all suits and proceedings arising under any law regulating commerce"; and on 49 U. S. C. § 49: "The district courts . . . shall have jurisdiction upon the relation of any person or . . . corporation alleging such violation by a common carrier, of any of the provisions of chapter 1 of this title [Interstate Commerce Act], as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ . . . of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ . . ."

As imposing duties for the enforcement of which the proceedings were instituted, respondents rely on the Interstate Commerce Act, 49 U. S. C. § 1(3): " . . . The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles . . . irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the . . . handling of property transported."

§ 1(4) "It shall be the duty of every common carrier . . . engaged in the transportation of . . . property to provide and furnish such transporta-

cuit court of appeals reversed. 91 F. (2d) 502. This Court granted a writ of certiorari. — U. S. —.

The city of Brownsville is on the north side of the Rio Grande opposite Matamoros. The respondent Navigation District, called the "Port of Brownsville," was incorporated under Texas law;[2] it includes a channel extending from the Gulf of Mexico about 17 miles to a turning basin which is located outside, and about five miles from the center of, Brownsville. The Port has no locomotive or cars; it has facilities at the basin to load and unload vessels, and a railroad track extending from the basin about a mile, to junction, at the boundary of the district, with a short branch or spur of petitioner, the Port Isabel & Rio Grande Valley Railway Company. Each of the other two respondents is engaged in business at the port as stevedore, freight broker, and forwarding agent. All the respondents are directly interested in the transportation of freight between the Port of Brownsville and points in Mexico via Matamoros.

Petitioner Thompson, as trustee in proceedings under § 77 of the Bankruptcy Act, operates the St. Louis, Brownsville & Mexico Railway and other lines of the Missouri Pacific System for transportation between gulf ports in Texas and Rio Grande crossings into Mexico. The Port Isabel, in all about 26 miles long, extends from the gulf to tracks operated by the trustee in the city of Brownsville. The Brownsville & Matamoros Bridge Company has a bridge and railroad tracks connecting the trustee's tracks in Brownsville with the National Railways of Mexico in Matamoros. Shipments between the Port of Brownsville and Matamoros must move about a mile over the tracks of the Navigation District, 7.4

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tion upon reasonable request therefor, . . . and to provide reasonable facilities for operating through routes . . ."

§ 1(11) "It shall be the duty of every carrier . . . to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

§ 6(1) "Every common carrier . . . shall file with the Commission . . . schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier. . . . If no joint rate over the through route has been established, the several carriers in such through route shall file . . . the separately established rates, fares, and charges applied to the through transportation . . ."

[2] Ch. 192, House Bill 724, 41st Legislature, Regular Session.

miles over the Port Isabel, 2.49 miles over the trustee's tracks and 1.24 miles over the Bridge Company's rails.

There is no joint rate applicable to transportation between the Port and Matamoros or any other point in Mexico over the tracks of petitioners, the Bridge Company and any railway in Mexico. The service performed by each petitioner is covered by a switching charge specified in its tariff filed with the Interstate Commerce Commission. Neither the tariff of the Port Isabel nor that of the trustee contains any rule, regulation or provision relating to the furnishing of cars for the transportation in question. The Port Isabel performs the initial movement of traffic from the Port; it has no cars or means to acquire any. The Mexican National Railways are the initial carriers of traffic in the other direction; they refuse to permit their cars to leave Mexico.

The trustee furnishes cars for transportation from the ports of Corpus Christi and Houston to gateways at Rio Grande crossings, including Laredo and Brownsville; in all that transportation he has substantial line hauls. But he refuses to permit cars delivered by him to the Port Isabel and taken by the latter to the basin for unloading to be reloaded for shipment into Mexico, and refuses to deliver to the Port Isabel cars under his control to be loaded at the Port; and if loaded there for transportation into Mexico he refuses to switch them en route. Without regard to ownership, control or distribution, the Port Isabel is willing to switch cars between the Port and its junction with the trustee's tracks.

After the district court dismissed this case, respondents filed with the Commission a complaint alleging that petitioners, principally by their failure to furnish equipment, refused to permit traffic to move between the Port and Matamoros, in violation of §§ 1 and 6 of the Interstate Commerce Act, and that the trustee's refusal to permit such use of his equipment, while permitting it between other ports and Mexico, violates § 3 of the Act. They prayed an order requiring petitioners to furnish equipment and to remove the prejudice and preference alleged. After hearing by the Commission but before its report, the circuit court of appeals announced its decision, in which it held that the district court has jurisdiction to grant mandamus, notwithstanding the petition for the writ alleged unreasonable and prejudicial discrimination

against the Port of Brownsville. After this Court granted the writ of certiorari, respondents filed a petition with the Commission asking it to defer action upon their allegations of violation of §§ 1 and 6. And the Commission did limit its decision to alleged violations of § 3. It held that the refusal of the trustee to furnish cars was not unduly prejudicial or preferential.

The respondents do not complain that petitioners refuse to switch cars furnished by other carriers or by the Port itself. Their grievance is not that petitioners refuse to do the switching covered by their tariffs at the specified rates; it is that in applying their tariffs, they discriminate against the Port of Brownsville in order to divert traffic to other ports and gateways so that the trustee may obtain substantial line hauls. The Act extends to transportation only so far as it takes place in this country. Petitioners are not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico. But that freedom from obligation does not imply that, in furnishing equipment for transportation beyond the boundary, petitioners may unreasonably discriminate between shippers, places, or classes of traffic within the United States. Cf. *Lewis etc. Co.* v. *So. Pac. Co.*, 283 U. S. 654.

As the Port Isabel does not own or control any freight cars, respondents may not have relief on the ground that the failure of that carrier to furnish them is unreasonable discrimination. As the trustee participates in traffic between the basin and points in Mexico only to the extent of an intermediate switching movement, he is not, as a matter of law, bound to furnish cars even for the part of the transportation that is performed within the United States. The question, whether the discrimination in the application of his tariff covering the switching movement is unreasonable, is an administrative one. Appropriate consideration of it may extend to many facts and circumstances, including the influence, if any, of the discrimination upon the trustee's line hauls between other Texas ports and points in Mexico, and to the broad field of competition legitimately available to carriers, shippers and commodities seeking transportation between the United States and Mexico. And the ascertainment of appropriate remedy for discrimination condemned calls for another administrative determination involving, it may be, investigation of numerous conditions

affecting transportation between the two countries. And as determination of reasonableness of petitioners' refusal to furnish cars for the transportation in question and the prescribing of change in the service, if any is to be ordered, are primarily within the regulatory powers of the Commission, the district court rightly held that it was without jurisdiction and dismissed the cause. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 493. *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304, 313. *Tex. & Pac. Ry.* v. *Am. Tie Co.*, 234 U. S. 138, 146. *Gt. No. Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285, 291. Cf. *Pennsylvania R. R.* v. *Clark Coal Co.*, 238 U. S. 456, 468. The decree of the circuit court of appeals must be reversed.

It is so ordered.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.